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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURT OF THE UNITED STATES,
FOR THE FIRST CIRCUIT.

VOLUME V.

CONTAINING THE CASES DETERMINED IN THE DISTRICTS OF NEW HAMPSHIRE, RHODE ISLAND, MASSACHUSETTS, AND MAINE, FROM THE NEW HAMPSHIRE OCTOBER TERM, 1827, TO THE MASSACHUSETTS OCTOBER TERM, 1830, BOTH INCLUSIVE.

By WILLIAM P. MASON,
Counsellor at Law.

BOSTON:
HILLIARD, GRAY, LITTLE, AND WILKINS.
1831.

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CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

NEW HAMPSHIRE, OCTOBER TERM 1827, AT EXETER.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
Hon. JOHN S. SHERBURNE, District Judge.

RICHARD SHERWOOD *vs.* RICHARD SUTTON.

Case for a deceit in selling a vessel as a *British* vessel, she being in fact not *British*, or entitled to a *British* national character. It was *held*, that the plaintiff was entitled to damages to the extent of the difference of value of the vessel as sold, and her value, if her real character had been known, and also to damages to the amount of such repairs made on her, on the faith of the representation of her *British* character, as had not been remunerated by her earnings or in any other way.

CASE for fraud and deceit in the sale of a vessel. There were five counts in the declaration. The fifth, which was mainly relied on at the trial, was in substance as follows:—That the defendant, on the 13th of October 1816, at *St. Barts* in the *West Indies*, having procured a certain foreign vessel or brig, not *British* built, &c. nor having a *British* register, &c. and having fraudulently procured a certain colourable paper purporting to be a *British* register of said brig, therein called the *Anna*, and in said register representing and setting forth one *William Hillyer* as a *British* subject to be the sole owner of said brig, and having fraudulently obtained and caused to be executed a certain paper purporting to be a power or instrument of attorney from the said

William Hillyer to the defendant to sell &c. the said brig as the property of him the said *William Hillyer*, with the fraudulent contrivance to sell the said brig as such *British* vessel, &c. and having navigated her to *Portland*, with intent to defraud the plaintiff in the premises, at *Portland*, to wit, at *Portsmouth*, in the district of *New Hampshire*, being in possession of said vessel, the defendant, pretending to act by virtue of the said supposed power of attorney and to represent the said *William Hillyer*, on the 1st of March 1817, in a certain conversation &c. concerning the sale of the said brig to the plaintiff, and in furtherance of his corrupt intent, then and there fraudulently represented to the plaintiff that the said brig was a true and proper *British* vessel, duly registered, &c. and entitled to the privileges thereof, and pretending to be the attorney of the said *William Hillyer* offered to sell to the plaintiff the same, as such *British* vessel, and then and there represented to the plaintiff that she was such, in order to induce the plaintiff to become purchaser thereof:—That the plaintiff, confiding in the representations so made, &c. did purchase the same for the sum of 1500 dollars; and paid the said sum therefor, and received a conveyance of the said brig from the defendant, executed by him as such attorney of *William Hillyer*. The count then proceeded to negative that she was a *British* vessel, built or owned &c. and averred, that she was in fact a *Spanish* vessel, owned by the defendant, or by the defendant jointly with one *Marwick*, and that they were then and there both citizens of the *United States*: That the plaintiff was then and there a *British* subject; that the defendant well knew all the facts, and by reason of the fraud aforesaid, the plaintiff lost the benefit of such purchase of a *British* vessel in *British* trade and navigation, and all the freight accruing therein; and that the said vessel hath been wholly lost to him, and a cargo of lumber &c. of the value of 10,000 dollars, and also large sums of money expended by him in repairs after the purchase thereof.

Sherwood vs. Sutton.

The other counts averred among other things a condemnation of the vessel upon a seizure under the *British* laws for her not being a genuine *British* vessel, entitled to trade and navigate as such. There were other special averments as to her original character as a *Spanish* vessel. But as nothing particularly turned upon these counts they are omitted.

The defendant pleaded, 1. the general issue, not guilty; 2. the statute of limitations of *New Hampshire*, that the cause of action did not accrue within six years.

Upon both pleas issue was joined. At the trial the following facts and circumstances were given in evidence.

In March 1817, at *Portland* in *Maine*, a negotiation took place between the defendant and the plaintiff respecting the purchase of the brig in question, which was then called the *Anna*, and so appeared to be on the ship's papers. The defendant then represented to the plaintiff, that she was a *British* vessel, entitled to a *British* register, and belonging to one *William Hillyer*, a *British* subject, and that the defendant was authorized by him to sell her as such. He produced a letter of attorney from *Hillyer*, authorizing him to employ the vessel at his discretion, and also to sell her; and he also produced a certificate that the brig had entered and cleared at *New York* as a *British* vessel, and had conformed to the rules of the *British* Consulate there. He further represented the brig to be the *British* brig *Anna*, which had been condemned as a prize of war in the *British* Vice-admiralty Court at *Halifax* and had subsequently been sold, and had lawfully received a *British* register, and was duly entitled to such register, as such prize vessel. The plaintiff also introduced evidence to prove that the brig was not in fact the *British* brig *Anna*, or any other *British* vessel; but was a *Spanish* vessel, named the *St. Antonio*, and had been bought by the defendant, knowing her to be a *Spanish* vessel, and that at the time of the sale to the plaintiff, she really belonged to the defendant (who is an *American* citizen), and that *Hillyer* was a non-

nal, and not the real owner ; that the defendant had procured for her a false register as the *British* brig *Anna* ; that as a *Spanish* vessel at the time of the sale to the plaintiff, she was not worth more than 500 dollars ; that the plaintiff upon the representations made by the defendant purchased her upon the faith of the truth of that representation for 1500 dollars, and paid the price accordingly to the defendant, who executed a bill of sale of her to the plaintiff, as attorney of *Hillyer* : that the plaintiff was a *British* subject, and bought the vessel for the purpose of carrying on *British* trade and navigation. After the purchase, the plaintiff repaired the brig at *Portland* at a large expense, about 1900 dollars, she being found upon examination very much out of repair and in a bad and defective state. After those repairs were made, the brig, if really *British*, would have been worth in the *West Indies* 5000 or 6000 dollars ; but as a *Spanish* vessel not more than 500 dollars. The brig, after being repaired, was employed by the plaintiff about two years in trade between the *West Indies* and the *United States* as a *British* vessel, and was subsequently seized and condemned by the *British* authorities in the *West Indies* ; but the sentence of condemnation did not state the particular cause of condemnation.

There was also evidence to prove, that the plaintiff did not know, that the vessel was not *British* until within six years next before the commencement of the suit, which was left to the jury ; and also to prove, that the defendant was the true and real owner of the vessel, and *Hillyer* only nominal owner, and that the name of *Hillyer* was kept in the ship's papers to preserve an ostensible *British* ownership, and entitle the brig to trade as a *British* vessel ; and that the defendant wilfully and fraudulently made the representations at the time of the sale, with a view to induce the plaintiff to make the purchase ; and that if he had known or suspected her to be *Spanish*, he would not have purchased her, his sole object being to employ her in *British West India* trade.

There was also evidence in the case, that on the first voyage, which the brig made from *Portland* to *Jamaica* after being repaired, the plaintiff felt uneasy on account of the papers of the brig; that he procured a new register and other papers at *Jamaica* for her, as a *British* vessel, and then said, "he felt safe." But the particular cause of the plaintiff's uneasiness did not appear in proof; but circumstances only conducing to prove, that it arose from difficulties made at the custom-house at *Jamaica* on account of the repairs of the vessel at *Portland*.

Long before the sale to the plaintiff, viz. in October 1816, the defendant had employed a carpenter at *Portland* to grave and caulk the brig. He commenced caulking and cutting her, and worked six days upon her, and, as far as she was opened, she was found to be in so bad and defective a state, that she was deemed by him not worth repairing. She was then removed to a cove, and was farther opened, and was in a situation to be examined by any person.

The statute of 26 *George 3d*, ch. 60, was cited from *Abbott on Shipping*, to show that the repairs of 1900 dollars on her, under such circumstances, were sufficient to deprive the vessel of her *British* character.

Saltonstall, for the defendant, contended, that the four first counts were not proved, for there was no proof of any condemnation or seizure for the cause asserted in these counts. Then as to the fifth count it is not proved. The material averments in it are, that the vessel was *Spanish*, and that the defendant, and not *Hillyer*, was owner of her. These facts are not established by any competent evidence. The proof, so far as it goes, is, that *Hillyer* was owner, and so was represented by the defendant. The bill of sale was made to the plaintiff by the defendant as attorney of *Hillyer*.

Again. The plaintiff has sustained no damage. The vessel has been condemned, it is true, but *non constat* for what cause. It may have been for a totally different cause, and illegal pro-

ceeding on the part of the plaintiff. She was successfully employed by him for two years after the purchase in trade as a *British* vessel. Besides, the repairs of the vessel at *Portland* after the sale were so great, that they would *per se* deprive her of her *British* character by the *British* registry act, 26 *George 3d*, ch. 60, § 2. *Abbott on Shipp.* 39. So, that in fact she has lost her *British* character by his own illegal act and trade.

The plaintiff must, from the circumstances, have known the real character and history of the vessel as well as the defendant at the time of the sale. It is not reasonable to presume his ignorance of it.

Then, as to the statute of limitations, there is no proof of any concealment, much less of a fraudulent concealment by the defendant. And we deny that any such concealment, if fraudulent, is a good answer to the plea. *Troup vs. Smith*, 20 *Johns. R.* 277; 3 *Barn. & Ald.* 288.

Mason and Cutts, for the plaintiff, contended *è contra*. Here was a fraudulent misrepresentation. The vessel was represented to be *British*; she was not so, and the defendant knew the fact. We rely mainly on the fifth count. The gist of our action is the false affirmation, that the vessel was *British*, and not the particular ownership. But the defendant was the real owner. All the acts of the parties, and the circumstances of the case prove it. *Hillyer* was merely a nominal owner; and so stated in the papers because it was necessary, that a *British* subject should appear as the owner. The defendant is an *American* citizen.

The plaintiff could not at the time of the purchase have known that the vessel was *Spanish*. As such she could not have been worth 1500 dollars at that time. So is the proof. He bought her as a *British* vessel for *British* trade.

As to the repairs forfeiting the *British* character of a real *British* vessel, that is nothing to us. It is no part of our case. This is not a real *British* vessel. The fraud upon us was complete at the time of the sale, and the subsequent repairs furnish no excuse from damages for the fraud.

As to the statute of limitations, there is no pretence of any discovery of the fraud by the plaintiff until within six years. He had no means of discovering it ; as soon as he did, he brought his action. The defendant has not proved, that he ever made it known to any person, who could have told us, or given any public information.

STORY J. in summing up to the jury said :—Upon the issue joined between the parties upon the statute of limitations, the real question is, whether the fraud of the plaintiff alleged in the declaration was concealed by the defendant, so that it never came to the knowledge of the plaintiff until within six years before the commencement of this suit. There is no pretence, that either *Hillyer*, or the defendant himself, ever communicated the facts to the plaintiff, or to any other persons, so that they could be publicly known or communicated to the plaintiff at an earlier period. Under such circumstances the jury must draw their own conclusions from the natural presumptions arising from the facts in evidence and the situation of the parties, and find their verdict accordingly.

It is not controverted, that this vessel was in fact the *Spanish* brig *Antonio* ; and was not a *British* vessel. The defendant has not attempted to maintain, that she was the *British* brig *Anna*, or *bonâ fide* entitled to use the *British* register belonging to that vessel. If then the jury are satisfied, that the register used for the brig *Antonio*, though genuine, belonged to the *British* brig *Anna*, and that the defendant at the time of the sale to the plaintiff knew the fraud, and was a party to it, and also knew, that the brig *Antonio* was a *Spanish* vessel, it seems to me, that the averments in the declaration, negating the *British*, and averring the *Spanish* character of the brig, are completely made out.

But it is said, that the repairs made at *Portland* were such, that if the brig had possessed a genuine *British* character, she

would, by the *British* registry acts have forfeited her national character; and if she afterwards sailed under her register, she was liable to seizure and condemnation therefor. And I am called upon to state, that if the repairs so made exceeded fifteen shillings a ton, these repairs did in fact destroy her national character. I cannot give such an instruction to the jury, for several reasons. In the first place, there are not sufficient facts established in the case to enable the Court to say, that such would be the necessary effect of the repairs in the present case under the *British* registry acts. If this had been a real *British* vessel, and the repairs were no more than were necessary to enable her to return to a *British* port, and prosecute her voyage thither; and if the necessity for such repairs had arisen since her last departure from a *British* port, it is by no means clear to my mind, that the case would not be fairly within the reach of the exceptions of the *British* registry acts, as they have been read at the bar from Mr *Abbott's* Treatise on the Law of Shipping. As far as my recollection goes, the *British* courts have been disposed to put an indulgent construction upon those acts in cases, where there has been a clear necessity for the repairs to prosecute the voyage. Now the evidence does not show in particular when, or how, or under what circumstances, or at what time the necessity for these repairs arose. The plaintiff was not privy to her former history, and cannot be presumed to be acquainted with facts occurring previous to his purchase. Nor has it been established in proof, that if the brig had been *bonâ fide British*, she would in fact have lost her national character by these repairs. There is no evidence, that she has been seized or decreed to be forfeited on this account. It is admitted, that upon her return to *Jamaica* after these repairs, she was allowed upon the change of ownership to receive a new register at that port, as a *British* vessel; and though there seems to have been some hesitation or difficulty about the matter, the final decision affords some presumption, that the repairs (great as they were) were not deemed

ipso facto to destroy her *British* privileges and character. But this point is the less material, because, however the case might be as to a real *British* vessel, if this brig had not that character, the repairs could not bar the plaintiff's right of recovery. She is not proved to have been seized or condemned on account of these repairs; and the injury done to the plaintiff by the fraudulent misrepresentation of the defendant gave him a complete title to an action for damages.

The right of action then being complete by the fraudulent misrepresentation, (if sufficiently proved,) independently of any subsequent events; the next question is, what damages the plaintiff is entitled to recover. My opinion is, that he ought to recover to the extent of the actual injury sustained by him. The true rule of damages in cases of this nature is, to allow the difference between the value of the vessel, if her real character had been known, and the price, at which she was bought under the faith of her being a vessel entitled *boná fide* to the privileges and benefits of such a *British* character. To this extent at least he has sustained a loss. Now it is in proof, that as a *Spanish* vessel, at the time of the purchase, she was not worth more than 500 dollars, that is, than the value of her materials, if she were broken up. As a *British* vessel she was worth 1500 dollars; and on the faith of the representation made of her possessing such character, the plaintiff gave that sum for her. The difference between these sums is a loss actually sustained by the plaintiff, for he had paid 1000 dollars more for the vessel than she was worth, and that upon a false representation of the defendant. But it farther appears, that upon the faith of this representation the plaintiff went on and expended about 1900 dollars in repairs; and I am of opinion, that of this sum the jury are at liberty to allow the plaintiff such portion as they deem reasonable to remunerate any loss, for which the plaintiff has not received any indemnity or compensation by the subsequent earnings of the

ship or otherwise. For the loss was a direct consequence of the fraudulent representation.

It has been argued, that the plaintiff ought not to recover any more than nominal damages, because the condemnation may have been caused by the amount of the repairs. But I am of a different opinion. In the first place, as has been already observed, there is no sufficient proof of the real cause of the condemnation. In the next place, if the averments in the declaration are proved, the plaintiff has manifestly sustained more than a nominal damage. He has at least paid 1500 dollars for what was worth no more than 500 dollars; and this by the fraud of the defendant. What answer to him could it be to say, I have cheated you out of 1000 dollars, and because you have lost the vessel by another cause, I am entitled to retain the money?

There appears to me to be sufficient evidence (if believed) to show, that the plaintiff has sustained more than nominal damages; and the jury are bound to allow him such as in their judgment he has sustained in consequence of the fraud.

Verdict for the plaintiff—\$4364,50.

Note. A bill of exceptions was filed, and a motion made in arrest of judgment, which was argued at May term 1828, and decided at October term 1828. See *post*.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM 1827, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN PITMAN, District Judge.

JOHN MC DOWELL *vs.* THE BLACKSTONE CANAL COMPANY.

Advances made on account generally, for work done under several distinct contracts, some of which have not been completed, must be applied in the first place to the extinguishment of the amounts due on the contracts which have been completed, and not of those which have not been completed.

ASSUMPSIT on several counts. (1.) On a special agreement for excavating and embanking sections Nos. 11 and 12 of the *Blackstone* canal, at 10 cents per cubic yard for excavation, &c. &c. (2.) For labour and services generally. (3.) For work and labour by a person as agent of the plaintiff. There were several other counts, which the plaintiff discontinued before the trial. Plea, the general issue.

At the trial it appeared in evidence, that sundry sums of money had been advanced, from time to time, by the *Canal Company* to the plaintiff, for which he had given receipts, acknowledging the same to be *advances on account generally*. It also appeared in evidence, that the plaintiff had entered into several distinct contracts for the excavation &c. of several sections of the canal, in

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Nos. 11 and 12, and No. 14. The two former contracts had been completed ; but No. 14 had never been completed by the plaintiff. The advances made exceeded the sums due for the contracts for the excavation &c. of Nos. 11 and 12, if they were - applied to that purpose. The work on No. 14 was going on in connexion with the other work between December 1825 and March 1826, when part of the advances were made. No 14 however was left by the workmen unfinished, and they abandoned the completion of that contract.

The principal question was in what manner the payments by way of advance were to be applied ; and it was argued by *Randall* for the plaintiff, and by *Whipple* for the defendants.

STORY J. It is the opinion of the Court, that the advances being made on general account, and being so stated in the receipts, are to be applied in the first place to extinguish the amounts due upon the contracts which have been completed, and upon which alone the plaintiff has entitled himself to receive payment. They therefore go to discharge the amounts due for the completion of the contracts for the excavation and embankment of sections Nos. 11 and 12. But the work and labour upon section No. 14 was done under an entirely new and distinct contract, and that contract has never been fulfilled by the plaintiff so as to entitle him to any payment. On the contrary, his workmen have abandoned the job and run away. The advances therefore cannot be applied by the plaintiff in part payment of this contract, though made between December 1825 and March 1826, while the whole work on all the sections, Nos. 11, 12 and 14, was going on, for the decisive reason, that no man has a right to apply advances to a contract, when he has no claim to any money as earned under that contract. The money advanced is more than sufficient to pay all that is due, under the contracts for sections Nos. 11 and 12 ; and therefore we think it must be so applied in point of law, and the plaintiff, not having sued on the

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contract for section No. 14, is not entitled to recover in this action. Indeed it appears, that No. 14 has been since finished by other persons, upon a new contract with the corporation, at an extraordinary expense.

The plaintiff submitted to a discontinuance.

LUTHER LOOMIS vs. DANIEL WILBUR.

It is not waste, in a tenant for life, to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, for such repairs, provided this be proved to be the most economical mode of making the repairs.

THIS was an action of waste under the statute of *Rhode Island*, (See *Digest of 1822*, p. 199,) for the recovery of the freehold wasted. Plea, the general issue.

Daniel Wilbur, deceased, by his will, made on the 20th December 1802, and proved on 1st of June 1807, devised all his lands undisposed of, including the premises, to his son *Daniel Wilbur*, the defendant, for his life, remainder to his wife for her life, if she survived him, remainder to *Daniel Wilbur*, his grandson, and son of his son *Daniel*, in fee; but if his said grandson died before 21 years of age, &c. then to his son *Daniel* in fee. The grandson attained the age of 21 years and is still living. The grandson sold his interest in the estate to one *James Aldrich*, through whom, and by intermediate conveyances, and a levy on execution, the premises came to the plaintiff on the 23d of December 1825.

The only waste proved was, the cutting of a few timber trees sparsely on the land, not exceeding ten or fifteen in number. It was proved, that the defendant was very poor and unable to repair the fences and buildings from other means; that the principal part of the trees were cut down for repairs of the build-

ings. They were sold by an agent, and boards, already sawed, &c. were purchased with the proceeds and applied to the repairs. This was the most economical way of attaining the object, and most for the benefit of the estate, and was done on consultation with the agent, before the trees were cut down. It was also proved, that a timber tree or two were cut down, and sold ; but whether the proceeds were applied to repairs did not appear. But it did appear, that the defendant owned a contiguous wood lot, and sometimes used the timber from that lot for fire bote and house bote.

The cause was argued by *Richmond* for the plaintiff, and by *Tillinghast* for the defendant. The plaintiff contended, that the case of waste was clearly made out, and that the sale of the timber was waste by the authorities ; that the tenant might have cut down trees for the necessary repairs and fire bote ; but had no right to sell them ; and he cited *Bac. Abridg. Waste F.* The defendant contended, that there was no waste ; that no injury was done to the estate ; that repairs were necessary ; and there was no difference between applying the proceeds of the sale and the identical timber.

STORY J. in summing up to the jury said : The supposed waste in this case is so very small in point of value, that if a forfeiture is incurred, it must operate with peculiar severity. The jury therefore ought clearly to see, that the plaintiff makes out his case upon reasonable evidence. The question in cases of this nature is, whether the tenant has done any injury to the inheritance ; for the averment in the declaration is, that the timber has been cut down to his disherison. If, under all the circumstances, what has been done, has been for the benefit of the estate, for necessary repairs, and for the interest of the remainder-man, then there has been no waste. Now it is admitted, that the tenant is very poor and had no other means to repair ; and that the repairs were indispensable, and any longer omission would have been very

injurious to the estate. The quantity of timber applied to the repairs is not pretended to be extravagant or unnecessary. But it is said, that the same timber, which was cut down, ought to have been applied, and not sold, and that the sale was *per se* waste. For this position reliance is placed on a citation from *Bac. Abridg. Waste F.*, where it is said, that if a lessee cuts trees and sells them for money, though with the money he repairs the house, it is waste. The authority relied on in *Bac. Abridg.* is 1 *Co. Litt.* 53 *b.* The doctrine there stated may be good law, if it be properly understood and limited. If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste ; and if so, it would not be purged or its character changed, by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were *bonâ fide* applied for that purpose, in pursuance of the original intention, it does not appear to me to be possible, that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense, that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate.

As to the other part of the case, the sale of one or two trees, the application of which to repairs is not established, it is, if at all, waste in its most minute form. But the jury will judge of the facts, and consider in the first place, whether the proceeds might not have been applied to the repairs. In the next place, if they were not, but if an equal quantity of timber from the other woodlot of the defendant was so applied, and these trees were only taken by way of compensation and remuneration therefor, then there was no waste.

It has been said, that the terms of the will make the tenant for life dispunishable of waste, and that the intention was to give him a full and entire control of the inheritance during his life. The

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words are certainly very broad and comprehensive, giving ample powers to a tenant for life for general purposes ; but my opinion is, that they do not authorize any act to be done, which injures the inheritance, much less do they authorize positive waste.

Verdict for the tenant.

EBENEZER WAKEFIELD vs. LEMUEL ROSS.

Where a boundary is disputed between parties who own adjoining tracts of land, and they agree to erect a fence on what is supposed to be the true boundary, and the possession continues according to that line for twenty years, in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one, and to conclude persons claiming under them by subsequent conveyances.

Where *A.* owned the head lot No. 18, and sold to *B.* forty acres on the east end of that lot, and afterwards sold to *C.* by the following description ; " a certain tract or parcel of land situate, &c. and contains thirty acres by measure," being " the west part of the head lot No. 18," it not being shown, that the parties at that time knew, that the whole lot contained more than seventy acres, although in fact it did contain more ; it was held, that the deed to *C.* conveyed all the land in the lot, not conveyed to *A.*, and was not limited to thirty acres at the west end of the lot. There being actual boundary lines afterwards stated in the same deed, it was farther held, that those boundary lines must govern, even if they included more than thirty acres.

Where a party is disseized, he cannot convey by a quitclaim deed his title to the premises of which he is disseized.

Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses.

EJECTMENT for lands situate in *Rhode Island*. The defendant pleaded, 1. not guilty : 2. the statute bar of twenty years' possession under the statute of *Rhode Island* for quieting possessions. To the last plea there was a replication denying the twenty years' possession. Issues being joined on both pleas, the cause was tried at this term, when the material facts and evidence, were as follows.

The plaintiff's demand was for two contiguous parcels of land, one of which he claimed as owner of the south part of the head lot No. 17, and the other as the owner of the east part of the

head lot No. 18, of which last the defendant owned the west part. These *head lots* are lots which were set off to the original proprietors of lands in *Providence* county after a revision of the boundary line between *Rhode Island* and *Connecticut*, and lying between the line first erroneously drawn for a boundary between the two states and the line since established. (1.) The titles and claims of the parties to the first parcel of land, viz. the south part of the head lot No. 17, were as follows.

In 1788, *Samuel Eddy*, under whom the plaintiff claimed the first parcel of land above mentioned, purchased a tract of land lying in the southwest corner of head lot No. 17, of one *Stephen Bowen*, and subsequently conveyed the same to his son *Samuel Eddy jun.*, bounding him on the land of *Bradley Greene*, the defendant's grantor, then the owner of the whole head lot No. 18, lying south of No. 17. The validity of the title deeds exhibited in this part of the case admitted of no controversy; the plaintiff deduced his title through several mesne conveyances, from *Samuel Eddy*, on the one side; the defendant, on the other, proved his deed from *Bradley Greene* conveying the west part of lot No. 18, dated December 5th 1801, and the question here was wholly in relation to the boundaries between lot No. 17, and lot No. 18, and the possession of the parties.

Previous to the last mentioned conveyance, and while *Eddy* and *Greene* were respectively owners and in possession of these contiguous lots, a dispute arose between them in regard to the western part of their dividing line. It did not appear at that time to be controverted, that a certain black-birch tree on the east side of the head lots was a dividing boundary between Nos. 17 and 18, and that the line was thence a straight course westerly to a large rock; but the remainder of the line from that rock out to the state line was in dispute, *Greene* contending, that he was entitled to go farther north than a fence that stood there, and *Eddy* insisting, that the line was farther south. One of the sons of *Eddy* (who was produced on the trial as a witness by the defend-

ant) was thereupon called in to assist the parties in adjusting and settling the line. Upon his decision and advice the line was then settled, and the fence was placed accordingly. No farther controversy in respect to this line appeared to have arisen until the plaintiff, having become possessed of the *Eddy* title, brought an action against the present defendant in the State Court of Common Pleas in the year 1824, and therein claimed a quantity of land south of the above line. This action was discontinued without a trial; and after taking a deed from *Bradley Greene* of another piece of land, as hereinafter stated, the plaintiff commenced this suit. To support his claim south of the defendant's fence, and of the line between the rock and birch tree, he produced extracts from the proprietors' records, and the copy of an ancient plat, showing, that lot No. 17 was originally of greater width from north to south than the adjoining lots, an allowance being made on account of a body of water, called Long pond, contained within it. He did not, however, prove the original boundaries of the north side of that lot, but examined several witnesses who testified, that the former owners of the south part of it, under whom he claimed, had anciently sowed a field south of the abovementioned rock, and, in some instances within twenty years, had cut young wood, for hoop-poles and other purposes, south of the line between the rock and birch tree.* This

* With respect to two of the witnesses, a father and son of the name of *Richardson*, the counsel for the defendant objected to their admission, as witnesses, upon the ground of their want of any religious belief; and to establish the fact a witness was called, who swore that he knew the persons well, that he had often heard the son say, that he did not believe in the existence of a God, or of a future state. As to the belief of the father, he said, that he had heard him declare, that he did not believe in a future state; that he had read *Tom Paine's* works; and did not know, whether he (the father) believed any thing. In answer to a question from the Court whether the father believed in a state of rewards and punishments, the witness answered only as be-

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testimony was relied on as proof of the original boundaries and of interruptions to the defendant's possession.

It was answered on the part of the defendant by proof, that the sowing of the field was before the settlement of the line ; that the cutting referred to was not with the intention to dispute the line from the birch tree to the rock, but from ignorance or mistake as to where that line, when drawn through the whole extent of the woodland, would fall ; and that when the error was discovered, no claim of right was pretended, but the persons by whom or by whose authority the cutting was done (one of them a grantor of the plaintiff) paid the defendant for the wood so cut. The defendant also proved all the exterior bounds of lot No. 18, as claimed by him ; that the birch tree and rock had been known as bounds more than thirty years by the witnesses sworn : and that his fence had remained in the place where it now stood ever since the settlement of the line by *Eddy* and *Greene*, which was more than twenty years before the commencement of the plaintiff's first suit. The copy of the ancient plat introduced by the plaintiff was also relied on by the defendant as showing, that the north line of lot No. 17 was originally much farther north than now supposed by the plaintiff, as appeared by the platted distance

fore, adding, that from the statements of the father he did not seem to believe any thing.

It was then suggested on the part of the plaintiff's counsel, that the father and son might be examined personally as to their belief, for the father might be an Universalist. To this suggestion the Court answered, that the defendant's counsel, who took the objection, were not bound to rely on the testimony of these persons for proof of incompetency.

The Court said, We think these persons are not competent witnesses. Persons who do not believe in the existence of a God, or of a future state, or who have no religious belief, are not entitled to be sworn as witnesses. The administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being, and is the sanction which the law requires upon the conscience of a person, before it admits him to testify.

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of that line from the northern margin of Long pond, and that the whole width of that lot might be found by going to that original line from the aforementioned birch tree.

(2.) The other parcel of the demanded premises, lying within lot No. 18, was claimed by the plaintiff as grantee of *Bradley Greene*, by a quitclaim deed, executed in August 1825, and hereinafter mentioned. It appeared in evidence, that on the 24th of August 1801, *Bradley Greene*, then being the owner of the whole of lot No. 18, much of which was wild and uncultivated, conveyed to one *Jacob Woodland*, a parcel thereof at the east end, by the following description, *viz.* "one certain tract or parcel of land, situate &c., it being part of the head lot, so called, belonging to the said *Bradley*, and No. 18, bounded as follows, beginning at the southeast bound of said lot, thence northerly sixty rods, then west the same width, bounding on the south line of said lot, *to extend so far west, as to include forty acres by measure.*" Under this deed, *Woodland* went into possession up to a ridge called Ridge hill, extending across the lot from north to south, as his western boundary, and improved and occupied the land to that boundary until A. D. 1810, when he sold it; and the same after several intermediate conveyances came to the plaintiff *Wakefield*, in April 1824, by a quitclaim deed from *William Ross*, by which *Ross* released to him the same, by the following description, *viz.* "all the right, title, and interest, that I have, or ever had, in one certain tract of land, situated &c., *containing forty acres*, and being the easterly part of lot No. 18, bounded as follows: beginning at a white-oak tree, a bound of *David Allen* and *Ziba Ross*, then westerly joining *Ziba Ross's* land $80\frac{3}{4}$ rods to a stake and stones; thence northerly, 73 rods to No. 17, to a stake and stones; thence easterly, joining No. 17, to a black-birch $80\frac{3}{4}$ rods; thence southerly, straight to the first bound."

On the 5th of December 1801, *Bradley Greene* conveyed to the defendant, *Ross*, another parcel of the lot No. 18, on which

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he now resides. The description in the deed is as follows : " one certain tract or parcel of land, situate &c., and contains thirty acres by measure, being the west part of the head lot, called No. 18, and bounded as follows : viz. beginning at a stump of a stadle with stones about it, standing on the State line, and being the southwest corner bound of the 17th head lot; thence east, adjoining said lot, eighty rods to a stake and stones; thence south sixty rods to a stake and stones, thence west eighty rods to the State line; thence north on said line, to the first mentioned bound." Under this deed the defendant, *Ross*, took immediate possession, and occupied, and cut wood up to the same Ridge hill, as the boundary between him and *Woodland*, and assented to by both. The contiguous land on the north, in some of the deeds, under which the plaintiff holds his title thereto, is described as bounded on the south by the defendant's land, and the said *Woodland's* lot, without any intimation of, or any reference to, any strip of land intervening between them.

There was no proof, that *Bradley Greene*, after his conveyance to the defendant in 1801, was, or claimed to be, in possession of any part of lot No. 18, or that he did any act indicating ownership, or a belief on his part that he had not conveyed the whole of that lot, until the deed of 1825, mentioned below. On the contrary, it appeared, that he became poor; that he was not assessed for any property in the town in which the lot lay; and in the year 1823, being confined in gaol for debt, he made his complaint to a magistrate in conformity with the statute of *Rhode Island* setting forth, that he had no property wherewith to support himself in prison, or pay prison fees, and was thereupon admitted to the poor debtors' oath and discharged. It was ascertained, that the lot No. 18 really contained more than the quantity of seventy acres; and sometime in August 1825, the said *Bradley Greene* executed a quitclaim deed to the plaintiff, *Wakefield*, of sixteen acres and 100 rods of land, describing it as lying between the land conveyed by his former deeds to the defendant,

Ross, and that conveyed to *Jacob Woodland*, in lot No. 18. The deed was proved to have been signed at the plaintiff's house in *Connecticut*, a short time before the death of *Greene*, but it was not dated nor acknowledged, and although the consideration expressed in it was seventy dollars, that was not shown to have been paid; but the plaintiff proved, that on signing the deed, *Greene* received of him two pigs and five sheep. Under this last deed the plaintiff claimed to recover of the defendant, the land described therein, the same being in the defendant's possession.

The case was argued by *Steere* for the plaintiff, and by *J. L. Tillinghast* for the defendant. For the plaintiff it was contended, as to the south part of lot No. 17, that there had not been 20 years' exclusive possession sufficient to introduce the bar of the statute. That the possession was mixed, and was intended to be according to the true boundaries between lots No. 17 & 18. *Bradley Greene* sold by metes and bounds, and measure. If the possession was not mixed, the evidence established that the possession was in the plaintiff at the time of the defendants' purchase from *Bradley Greene*.

As to the other parcel of land, part of lot No. 18, it was contended, that *Bradley Greene* was the owner of the whole. He sold at the east end of it *forty* acres only to *Woodland*. Afterwards, he sold only *thirty* acres at the west end to *Ross*. The whole lot contained sixteen acres more than the *seventy* acres sold; and this intermediate strip, the residuum of the lot between the parts sold on the eastern and western ends, was left in *Bradley Green*, and the plaintiff by his purchase from *Greene*, in August 1825, was entitled to recover it.

The defendant contested both points; and argued, that the plaintiff had shown no title to a recovery for either parcel of the land now demanded.

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STORY J., in summing up to the jury, said, (1.) The question, as to the first parcel of land in controversy, turns upon a mere point of boundary between the lots No. 17 and No. 18.—The question is, whether the land now possessed by the defendant, *Ross*, as the northern boundary of lot No. 18, includes any portion of the land belonging to lot No. 17. It is often matter of extreme doubt, how the exact boundaries run in cases of laying out lots of this nature. If the black-birch tree on the east side of the lot, No. 17, was an ancient boundary, and was so deemed by the respective owners in former times, and the line ran from thence west in a straight line to the large rock, spoken of, then we have arrived at some certainty. The question in dispute will then be narrowed down to the running of the boundary from that rock to the west line of the lot.—There is evidence in the case that at the time when *Samuel Eddy* was owner of the part of lot No. 17, now owned by the plaintiff, and *Bradley Greene* was the owner of lot No. 18, a dispute arose between them as to the boundary line on this part of their lots; and it was then adjusted and settled between them by one of *Eddy's* sons, and the fence put up accordingly; and that the possession has remained in the respective occupiers of the lots according to that line ever since. This was before the year 1801, when the defendant purchased from *Bradley Greene*. Now if this evidence is believed it is decisive of this part of the case. In the first place, as mere evidence of the true boundary, in a case like the present, what can be so satisfactory as such a settlement of boundaries made more than twenty years ago by the parties interested, and acquiesced in by themselves, and those, who claim under them, ever since. It would seem of itself almost conclusive as a presumption of right in the absence of all circumstances to rebut it. In the next place, if the parties have been ever since that period in exclusive possession and seizin of the lots according to this boundary, then the persons, under whom the plaintiff, *Wakefield*, claims title, were at the time of the conveyance to him disseized of the land now

in controversy, even if they had a title to it; and consequently the deed conveyed nothing to him in the land, of which his grantors were then disseized. This is a plain principle of the common law. But what is quite conclusive is, that such an exclusive possession for twenty years is a clear bar to any recovery, and is of itself a good title, by the express provisions of the statute of *Rhode Island*. The jury will therefore consider, whether this evidence is overthrown by any counter evidence in the case; and if not, whether it establishes such an exclusive possession. If so, their verdict ought to be for the defendant on this part of the case.

(3.) Then as to the other parcel of land, the intermediate strip, as it is called, in lot No. 18. It is true, that the deed of *Bradley Green* to *Jacob Woodland* conveys so much only of the east end of the lot No. 18, as would include forty acres. This conveyance was made in August 1801; and under it, *Woodland*, if the evidence is believed, occupied and possessed up to the Ridge hill, so called, as his true boundary, without objection; and it has not been disputed, that his possession was then deemed rightful. *William Ross*, by mesne conveyances, held it as owner in 1824, and then conveyed it to the plaintiff, who has ever since his purchase continued to occupy and possess it up to the Ridge hill. In December 1801, *Bradley Greene* conveyed a part of the same lot to the defendant, *Ross*, describing it in his deed as “a tract or parcel of land situate &c., and contains thirty acres by measure, being the west part of the head lot called No. 18;” and then specified its boundaries. The question is, what part of the lot is intended by this description. It is said, that ~~thirty~~ ^{thirty} acres only was intended to be conveyed; but there is no evidence to show, that the parties at that time knew or supposed, that the whole lot No. 18 contained more than seventy acres. No boundaries are stated in the deed, which establish any reservation to *Bradley Greene* of any strip on the eastern side of this part of the lot. No claim was ever made by him to any such strip, until he ex-

ecuted the quitclaim to the plaintiff in August 1825. He never was assessed for it in the town taxes; he did not, when he was liberated from gaol on account of his insolvency, assert it to be his property; but swore generally, that he had no property to support himself in gaol. The defendant has always possessed and occupied the whole of that part of the lot to the Ridge hill without objection, and cut wood there, as a part of the land conveyed by his deed. I state these, as facts, only upon the supposition, that the evidence in the case is believed by the jury; and of that they will judge; but if these are the facts, then they establish an exclusive possession in the defendant for more than twenty years, and consequently the statute of *Rhode Island*, of twenty years' possession, applies as a bar. Independently of that, the quitclaim of 1825 could not operate, because the defendant, *Ross*, was then in possession under a claim of right, and if he had no right, he was in under a disseizin. But I am by no means satisfied, that the deed from *Bradley Greene* to the defendant in December 1801 requires such a construction, as the plaintiff seeks to give it. The grantor had already conveyed forty acres on the east end of the lot. He does not in his conveyance undertake in terms to convey thirty acres and no more at the west end of the lot. The words of the deed are, "a certain tract or parcel of land situate &c., and contains *thirty* acres by measure, *being the west part of the head lot* called No. 18;" the measurement is, therefore, not the whole, but a part only of the description. It was not *thirty* acres, but "the west part of the head lot," which was intended to be conveyed. The east part was already sold; and it appears to me, that the true meaning of the deed, if the description had stopped here, would be, that it conveys the west part of the lot, as contradistinguished from the east part of the lot already sold. It would be a conveyance of all that part of the lot not already sold as the east part. The measure of thirty acres is not a limitation upon the extent of the grant, but a mere description of its supposed contents. If the words "contains *thirty* acres by

measure " had been left out, the construction of the deed must have been, such as I have intimated. The insertion of them does not, in my judgment, justify a change of that construction in a legal point of view. But the description of the premises sold does not stop here. The deed goes on to state the boundaries of the west part of the lot so sold. Now it is a general rule, that where there is a specific description by natural or artificial boundary lines, distances and quantity of contents must yield, if mistaken, to such lines. The parties are presumed to contract with reference to such known lines or objects ; and the insertion of distances or measure of acres is understood to be no more than a conjectural or probable estimate. In the present case, there is no evidence to establish, that the boundary lines stated in the deed do not include the whole land in the lot No. 18 not conveyed to *Woodland*, or in other words, the whole land west of the Ridge hill. On the contrary, it seems tacitly admitted, that, so far as those lines can now be traced, they are coincident with the defendant's claim and seizin. The whole difficulty, that has arisen, is from the supposed error in fixing the southeastern and northeastern boundaries of lot No. 18. If these are the white-oak and black-birch tree referred to by the witnesses, then much of the difficulty vanishes. The stress of the argument, therefore, for the plaintiff, necessarily rests on the ground, that by the true construction of the deed from *Bradley Greene* to the defendant, *Ross*, no more than thirty acres of land were intended to pass ; and that consequently, as lot No. 18 actually contains eighty-six acres and one hundred rods, the intermediate strip, of sixteen acres and one hundred rods, being the surplus beyond the *forty* acres conveyed in 1801 to *Woodland*, and the *thirty* conveyed to the defendant, *Ross*, remained in *Bradley Greene*, and were well conveyed by the quitclaim deed of August 1825 to the plaintiff. Now it is incumbent upon the plaintiff to establish the fact of such a strip remaining in *Bradley Greene* at the time of that conveyance. He has not shown, that the boundary lines stated

Wakefield vs. Ross.

in the conveyance from *Greene* to the defendant, *Ross*, would not include all the land to the Ridge hill, of which the defendant, *Ross*, is in possession. He has been obliged, therefore, to resort to a construction of the deed to *Ross*, which would limit the conveyance to him to thirty acres only by admeasurement, rejecting all the accompanying parts of the description of the premises. In this construction also he has failed. And in the last place the objection of a disseizin of *Bradley Greene* at the time of the conveyance in 1825 is decisive against any right of recovery under that conveyance, even if every other objection were removed.

Verdict for the defendant on both pleas, and judgment accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM 1828, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

UNITED STATES *vs.* ALEXANDER DREW.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors.

INDICTMENT for the murder of *Charles L. Clark* on the high seas on board of the *American* ship *John Jay*, of which *Drew* was master, and *Clark* was second mate. Plea, general issue.

At the trial the principal facts were not contested. But the defence set up was the insanity of the prisoner at the time of committing the homicide. It appeared, that for a considerable time before the fatal act, *Drew* had been in the habit of indulging himself in very gross and almost continual drunkenness ; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restlessness, uneasiness, fretfulness and irritability ; expressed his fear that the crew intended to murder him ; and complained of persons, who were unseen, talking to him, and urging him to kill *Clark* ; and his dread of

so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said, that whenever he laid down there were persons threatening to kill him, if he did not kill the mate, &c. &c. In short, he exhibited all the marked symptoms of the disease brought on by intemperance, called *delirium tremens*.

Upon the closing of the evidence, the Court asked *Blake*, the District Attorney, if he expected to change the posture of the case. He admitted, that unless upon the facts, the Court were of opinion, that this insanity, brought on by the antecedent drunkenness, constituted no defence for the act, he could not expect success in the prosecution.¹

After some consultation the opinion of the Court was delivered as follows.

STORY J. We are of opinion, that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion, that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the *immediate* re-

¹ See 1 *Hale P. C.* 29, 36.—1 *Russell P. C.* 11.—19 *State Trials*, 946.—3 *Paris and Troutt*. 140.—*Haslam on Insanity*, 50.—*Coates*, 34.—*Armstrong*, 372.—*Cooper Med. Jurisp.* 10.—*Arnold on Insanity*, 67.

sult of the fit of intoxication, *and while it lasts* ; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while *Drew* was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

D. Davis and *Basset* for the prisoner.

Verdict, not guilty.



UNITED STATES vs. EDWARD CLARKE AND OTHERS.

Under the Tariff act of 22d of May 1824, ch. 136, bombazines, being goods of which wool is a component material, are liable to pay a duty of 30 per cent.

THIS was a writ of error from the District Court. The original action was debt on a bond for duties on goods imported in the *Mercury*, *Birt* master, from *London*, in the common form. The bond was dated on the 5th of September 1826. Plea of a tender of \$151.18 on the day of payment of the duties, in

full of the duties, specifying the goods, and the duties payable on each kind, and among them bombazines of the value, with the charges, of £67. 0s. 10d., on which the duties amounted to \$65.49 ; that is to say, 20 per cent *ad valorem* increased by the addition of ten per centum of said amount in value. Replication, that the bombazines were a manufacture of which wool was and is a component part, and are by law subject to a duty of 33½ per cent, with the addition of ten per cent, &c. Demurrer and joinder. Judgment for the defendants, on which the writ of error was brought.

The cause was argued by *G. Blake*, District Attorney, for the *United States*, and by *F. Dexter* for the defendants.

STORY J. This is a writ of error from a judgment of the District Court of Massachusetts District, in a suit on the common bond given to secure the duties on certain foreign goods imported in the *Mercury* from *London*. It is unnecessary to consider the pleadings, because the parties have agreed, that the cause shall be decided upon its merits ; and in this view alone has it been argued at the bar.

The whole controversy turns upon the question, what duty is payable on bombazines of foreign manufacture imported into the *United States* under the act, commonly called the Tariff act of 22d May 1824, ch. 136. That act imposes “on all manufactures of wool, or of which wool shall be a component part, except worsted stuff goods and blankets, which shall pay 25 per cent *ad valorem*, a duty of 30 per cent, *ad valorem*,” &c. In a subsequent clause of the same section, it imposes “on all manufactures of silk, or of which silk shall be a component material, coming from beyond the *Cape of Good Hope*, a duty of 25 per cent *ad valorem* ; on all other manufactures of silk, or of which silk shall be a component material, 20 per cent *ad valorem*.” Non-enumerated articles pay a duty of 15 per cent *ad valorem*.

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United States vs. Drew.

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It has been suggested at the bar, that this fabric may fall under the class of non-enumerated articles. It does not strike me, that such can be the just, legal conclusion, upon the facts admitted at the argument, unless the act itself involves a repugnancy.

Bombazine is a fabric, (as was admitted at the argument,) composed of worsted and silk, that is, a fabric of which wool is a component material, and silk is also a component material. It is therefore clearly comprehended in the above enumerated description of goods paying an *ad valorem* duty, and the only question, which can properly arise, is, to which class does it, with reference to duties, in the contemplation of the legislature, appropriately belong.

The language of the first clause is, that "on all manufactures of wool, or of which wool is a component material, except worsted stuff goods," &c. a duty of 30 per cent shall be paid. If there had been nothing more in the act, there would be little ground for doubt. Bombazines are not in the commercial sense worsted stuff goods, for that description is understood, and indeed not questioned at the bar, to apply only to the lighter sorts of goods composed wholly of worsted, such as bombazetts, plaids, bindings, &c. Such was the contemporaneous exposition given by the Treasury Department to the language of the act, and it has never to my knowledge been controverted. The exception indeed is carved out of the preceding description; but it does not thence follow, that it is to be construed as co-extensive with, or applicable to, all the kinds of goods, which that description was intended to include. The terms "of which wool is a component material," necessarily suppose, that there were other materials in this class of fabrics than wool; for otherwise the specification would have been wholly superfluous, as the preceding words, "all manufactures of wool" would comprehend all, of which wool was the exclusive material. The exception of "worsted stuff goods" is therefore an exception out of these latter words, and in no just sense a limitation upon the natural meaning of the other words.

As, then, bombazines are not worsted stuff goods, and as they are goods of which wool is a component material, they are liable to the 30 per cent duty, unless it can be shown, that in some other part of the act there is an implied exception, or a necessary repugnancy, which defeats the duty. It is said, that the succeeding clause does create such an exception, because it lays a duty of 20 per cent "on all manufactures of silk, or of which silk shall be a component material;" and silk is a component material of bombazines. If the fact is so, (and indeed it is undeniable,) it seems to me to create, not a case of *exception* out of the preceding clause, but of *repugnancy* to it. Different duties are laid in different parts of the act on the same fabric; and as it would be impossible to say, which ought to prevail, neither could prevail. The act *quoad hoc* would be a nullity. The fabric could not strictly be deemed a non-enumerated article, which the legislature designed should be liable to pay a duty of 15 per cent *ad valorem* only, for it is doubly enumerated in the act; but the repugnancy of the clauses would lead to that as the necessary judicial conclusion.

If this would be the legal result, upon the argument, it certainly deserves great consideration, before it is adopted; for the legislature ought not to be presumed to create such a repugnancy, unless the conclusion be inevitable.

My opinion is, though it is not given without hesitation, that a construction may be adopted, which will give effect to each clause without involving such a necessary repugnancy. It is this. The first clause respects manufactures, of which wool is a component material, and was designed to embrace all goods, which fall within the general description, without any exception. If any particular fabric had been intended to be excepted, it would have been incorporated into the exception or proviso of that clause. This being assumed as the legislative intention, every subsequent clause is to be construed in subordination to it. When, therefore, the next succeeding clause laid a different duty on goods, of which

silk is a component material, there is an implied exception of all such goods as were already provided for in the preceding clause, that is to say, of all such goods as embraced wool and silk as component materials, leaving all other goods, of which silk was a component material, to the full operation of the duty of 20 per cent. In this way a natural and rational exposition is given to both clauses, and no repugnancy arises. And I think this construction greatly fortified by considerations derived from the other articles of cotton, flax, and hemp, in the second clause, in respect to which the same difficulty must arise, when they are in combination with wool. Nor should the observation be omitted, that this was the contemporaneous construction given by the Treasury Department, and it has hitherto silently prevailed without any legislative interference to cure the supposed defect in the act, or correct the supposed error of judgment in the department. The tariff act of 1828, just passed by Congress, has been referred to by the counsel for the defendant, to show that bombazines are specially named therein. This is true, but they are enumerated as a fabric, of which wool is a component part, and as an exception from a class, which is to pay a duty of 40 per cent *ad valorem*. But the same act places a duty on goods, of which silk is a component material, without excepting bombazines. So that this act plainly indicates a legislative opinion, that bombazines fall within the description of goods, of which wool is a component material, and are liable to pay duties as such, without the slightest suspicion, that it was necessary to except them from the clause respecting silks.

The judgment of the District Court must therefore be reversed with costs.

ANTONIO F. PICQUET, Administrator, vs. JAMES SWAN and Trustees.

Where a party defendant is a citizen of the *United States*, and resident in a foreign country, not having any inhabitancy in any state of the Union, the Circuit Courts of the *United States* have no power to maintain jurisdiction over him in a suit brought by an alien against him, although he has property within the district, which may be attached.

The judiciary act of 1789, ch. 20, does not contemplate compulsive process against any person in any district, unless he be an inhabitant of, or found within, the same district at the time of serving the writ.

The act of *Massachusetts* of 1797, ch. 50, prescribing the modes of serving process, does not apply to a case where the defendant has been an inhabitant, but at the time of the suit brought has his actual domicile in another state, or country.

Where an alien sues in the Circuit Court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the *United States* is not sufficient.

THE trustees were discharged at the last term ; and at this term, being the third term since the commencement of the suit, a motion was made, that the defendant be defaulted for his non-appearance, and judgment be given against him for such default according to the usual practice of the state courts of *Massachusetts*.

The motion was argued by *J. B. Davis* and *J. T. Austin*, for the plaintiff, and by *W. Sullivan*, as *amicus curiæ*, *è contra*.

STORY J. This suit was commenced by a writ, which is known in this state as the trustee process, but is better known elsewhere, as the process of foreign attachment, and was returnable to May Term 1827, of this Court. By the state laws it is a process equally applicable to cases, where the suit is against an inhabitant, and where it is against a non-resident, whether he has ever been an inhabitant or not. In the writ the parties are described as follows : the plaintiff as “ of the city of *Paris* in the kingdom of *France*, an alien, and subject of his Most Christian Majesty the king of *France*, in his capacity as administrator &c.”

Picquet vs. Swan.

and the defendant, as "now commorant of the city of *Paris* in the kingdom of *France*, of the city of *Boston*, in the commonwealth of *Massachusetts*, one of the *United States* of *America*, and a citizen of the said *United States*."

The return of the marshal on the writ is as follows :

"*Boston*, April 18, 1827. Pursuant hereunto I have attached all the real estate of the said *James Swan* lying and being in the district of *Massachusetts*, especially a lot of land in *Boston* in said district, bounded &c., called the *Washington Garden* &c., and summoned *William Sullivan*, Esq. agent for the said *Swan*, and on the same day I summoned the within named *Sullivan*, *Otis*, and *Howard* [the supposed trustees] to appear and show cause as within commanded, by leaving a true and attested copy of this writ at their last and usual places of abode. *The said Swan has not been an inhabitant or resident within this district for three years last past.*"

At the last term the trustees summoned in the suit were duly discharged. The defendant has never appeared as a party to the suit ; and it is now contended, that the plaintiff is entitled to consider him in default, and to have a judgment by default entered against him. That is the point, which has been argued, and is now to be decided by the Court.

I will briefly advert, in the first instance, to the local laws regulating this process, as they may be important to illustrate the conclusion, to which the Court has arrived, and also more fully to explain the grounds of the argument at the bar. The trustee process, under which the present suit is brought before the Court, owes its origin to the act of 28th of February 1795 (act of 1794, ch. 65), which was a substitute for the provincial act of 32 *Geo.* 2, ch. 2, to enable creditors to receive their just debts out of the effects of their absent or absconding debtors. It provides, that "the officer to whom the writ is directed shall serve the same by attaching the goods and estate of the principal in his hands and possession of the value required, if so much may be

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be found in his precinct, by reading the said writ to him, or by leaving an attested copy thereof at *his last and usual place of abode*, if he had been an *inhabitant or resident within this commonwealth at any time within three years next before the suing out such writ*, and by reading the same to each of the trustees, or by leaving an attested copy thereof at such trustees' usual place of abode ; and *in case the principal has not been an inhabitant or resident as aforesaid, a service made on the supposed trustee or trustees in manner as aforesaid, shall be deemed a sufficient service,*" &c. It further provides, that in case all the trustees are discharged, "the plaintiff may, notwithstanding, proceed against the principal to trial, judgment, and execution." A subsequent statute (act of 1798 ch. 5) has however provided, that "in all such cases, the plaintiff shall not proceed in his suit against the principal, unless there shall have been such service of the original writ upon the principal as would have authorized the Court to proceed to render a judgment against him, in an action brought and commenced in the common and ordinary mode of process." But the principal might voluntarily come into Court and take upon himself the defence of the suit. In the very case before the Court all the trustees have been discharged ; so that it is necessary to ascertain what service would be sufficient to entitle the plaintiff to judgment in an action by the common and ordinary mode of process, which is, by our local laws, by a writ known by the name of a writ of *capias* or attachment, and authorizing either an arrest of the person of the defendant, or an attachment of his goods or estate. The act of 17th of February 1798, (act of 1797, ch. 50,) provides for the mode of service of this process. Of course it can be used as a *capias*, only when the party is found within the state. When used as an attachment, the officer attaches the goods or estate of the defendant and a summons in due form is to be delivered to him, or left at "*his dwelling-house, or place of last and usual abode,*" fourteen days before the return day ; and "*in case the defendant was at no time an inhabitant or resident within*

this commonwealth, then such summons is to be left with his or her tenant, agent, or attorney, &c. ; otherwise the writ shall abate. There is also provision made in this act, that if the defendant is not an inhabitant or present in the state at the time of the service, and does not return before the time of trial, the Court may continue the same to the next term upon a suggestion of the fact on the record. If at such term the defendant does not appear, and be so remote, that notice of the suit could not probably be conveyed to him during the vacancy, the Court may continue the same to the next term, *and no longer*. After these two continuances, if he does not appear, judgment by default may be entered up against him. It is not material to follow up the proceedings consequent upon such judgment. But it may not be useless to add, that the trustee act of 1794, ch. 65, adopts regulations of a similar nature, in substance, to them.

Of their own force these processes and modes of service could have no validity in the courts of the *United States*. But by the act of Congress of 29th of September, 1789, ch. 67, the then existing forms of writs and modes of *process* (by which was meant modes of *proceeding*) in the Supreme Courts of the States, respectively, were adopted into the judicial proceedings of the courts of the *United States*; and by a subsequent act (act of 1792, ch. 36,) the same forms were perpetuated, subject to the authority in the Courts to alter and add to the same, in their discretion, so as to conform to the state jurisprudence. After the very elaborate expositions of this subject by the Supreme Court in *Wayman vs. Southard*, (10 *Wheaton R.* 1,) and *United States Bank vs. Halstead*, (10 *Wheaton R.* 51,) it is unnecessary farther to discuss the nature and extent, to which the state process applies in the Courts of the *United States*. The state acts of 1795, ch. 65, of 1797, ch. 50, and of 1798, ch. 5, have never been adopted by any formal rule of the Circuit Court in this district; but they have constantly been used in it, both as to process and service, ever since their first enactment; and must now be admit-

ted to be of as high authority by usage, as if any promulgation by rule, however formal, had taken place. They can have no effect, where they contravene the positive legislation of Congress ; nor can they give a jurisdiction to this Court, which it might not independently of them maintain. Where jurisdiction is given by any act of Congress, this Court may use the appropriate state process to enforce it. But the state laws can confer no authority on this Court to extend its jurisdiction over persons or property, whom it could not otherwise reach.

Let us, then, first examine the existing legislation of Congress on this subject. The constitution of the *United States* has, among other things, extended the judicial power to controversies between citizens of different states, and between citizens of a state and foreign citizens or subjects. The actual legislation of Congress has not as yet been coextensive with this constitutional boundary of jurisdiction. The judiciary act of 1789, ch. 20, provides, “ that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds 500 dollars, and the *United States* are plaintiffs, or petitioners ; or an alien is a party ; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state.” As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff, or the defendant is a citizen of the state, where the suit is brought. As to *aliens*, by which must be understood, in the language of the constitution, “ a foreign citizen or subject,” the jurisdiction is in all cases given, where an *alien* is a party. In a subsequent part of the same section is the clause, which has been so much commented on at the bar. “ But no person shall be arrested in one district for trial in another in any civil action before any Circuit or District Court. And no civil action shall be brought before either of said courts against an inhabitant of the *United States* by any original process in any other district than that, whereof he is an inhabitant, or in which he shall

be found at the time of serving the writ." It is observable, that the language is confined to *original* process, and does not apply to *final* process, or process of execution.

If this clause had not been inserted, what would have been the legal operation of the other clauses of the act? A prior section had divided the *United States* into certain judicial districts, whose limits generally were coextensive with the territorial limits of a single state. Within these districts a Circuit Court is required to be held at certain times and places prescribed by the act. The Circuit Court of each district sits within and for the same, and is bounded by its local limits. In the exercise of jurisdiction within those limits, the general principles of law must be presumed to apply to them all. Whatever might be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, that jurisdiction is available only within the limits of the district. The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of Kings Bench in *England*, though a court of general jurisdiction, never imagined, that it could serve process in *Scotland*, *Ireland*, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority. It was

doubtless competent for Congress to have authorized original as well as final process, to have issued from the Circuit Courts and run into every state in the union. But it has conferred no such general authority. In a single case only has it authorized (by the statute of 3d of March 1797, ch. 74, § 6,) writs of execution to run throughout the *United States*; and that is, upon judgments obtained for the use of the *United States* in any of the courts of the *United States*. By the act of 2d of March, 1793, ch. 66 [22], § 6, it has also authorized subpoenas for witnesses to attend the courts of the *United States* to be served in other districts within certain limited distances. And until a very recent statute (act of 20 May, 1826, ch. 123,) no authority existed to serve writs of execution, in favour of private persons, in any other district, than that where the judgment was rendered, although both districts were within the territorial limits of the same state. This very course of legislation, during a period of almost forty years, demonstrates the understanding of Congress, as well as of the profession, that the process of the Circuit Court could not be served in ordinary cases out of the limits of the judicial district, for which it was established. My brother *Washington*, in his able judgment in the case *ex parte Graham*, (3 *Wash. Cir. R.* 456,) has gone largely into the consideration of this doctrine; and I follow with undoubting confidence the whole course of his reasoning. I owe it, perhaps, as a matter of justice to myself to add, that the process in that case, from the Circuit Court of *Rhode Island*, was issued at the peril of the party, without any deliberate examination of the law on the part of the Court, the party being anxious to take it, *valere quantum valere possit*. If, therefore, the restraining clause already mentioned were not in the 11th section of the act of 1789, ch. 20, I should be of opinion, for the reasons so forcibly given by my brother *Washington*, that the exercise of the jurisdiction of the Circuit Courts by compulsive process, was essentially confined, by their very organization, within the limits of their respective districts. It would otherwise follow,

that final process might in all cases run into every district of the union, since the terms of the clause apply to original process only. Yet the professional opinion and practice, as well as the positive legislation of Congress in the cases abovementioned, demonstrate, that the contrary is the true construction of the act.

The jurisdiction of the Circuit Court in this case, so far as it depends upon the citizenship and alienage of the parties, may for the present be assumed *de bene esse* to be complete. But this alone is not sufficient to give the Court complete authority to proceed to judgment. There must exist other facts and circumstances as a just foundation of jurisdiction. Cases are familiar of actions, which cannot be maintained, although the parties are within the reach of process, from the nature and locality of the cause of action. Suits, which concern the realty, such as writs of entry, dower, ejectment, and trespass, *quare clausum fregit*, cannot be maintained in the Circuit Court, unless the land lie within the district, although the party reside there, and, in a personal view, the jurisdiction is unexceptionable. The reason is, that the title to real estate can by the general principles of law be litigated only in the state, where the land lies, and where the process may go to bind and reach the land, and enforce the title of the party. If, therefore, the land be sought, or in other respects the suit be purely local, it must be brought, where the law of the place acts on it directly.¹ Collateral suits for other purposes, binding the conscience, or controlling the acts of the party personally, may be brought and decided elsewhere.² This principle is recognized at the common law; but it has, to a certain extent at least, a foundation also in universal jurisprudence.

I have already intimated, that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity, and incapable of binding such

¹ See *Massie vs. Watts*, 6 Cranch, 148.

² *Ibid.*

persons or property in any other tribunals. If a state were to pass an act declaring, that upon personal notice of a suit brought against a foreigner, resident in a foreign country, proceedings might be had against him, and a judgment obtained *in invitum*, for aught I know, the local tribunals might give a binding efficacy to such judgments. But elsewhere they would be utterly void, as an usurpation of general sovereignty over independent nations and their subjects. Lord *Ellenborough*, in *Buchanan v. Rucker*, (9 *East R.* 192,) has put the case with great clearness and force. "Supposing," said he, "however, that the act had said in terms, that though a person sued in the island [of *Tobago*] had never been present within its jurisdiction, yet, that it should bind him, upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries? Can the island of *Tobago* pass a law to bind the rights of the whole world? Would the world submit to such a jurisdiction?" Nor would it in such a case vary the legal result, that the party had actual notice of the suit; for he is not bound to appear to it. No sovereign has a just right to issue such a notice, and thereby to acquire a jurisdiction to draw the party from his own proper forum *ad alium examen*. Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that except so far as the property is concerned, it is a judgment *coram non judice*. If the party chooses to appear and take upon himself the defence of the suit, that might vary the case, for he may submit to the local ju-

risdiction, and waive his personal immunity. Such appear to me to be the principles established by the better opinions in the cases cited at the bar, and particularly in *Phelps vs. Holker, &c.* (1 *Dall. R.* 261,) *Killburn vs. Woodworth*, (5 *Johns. R.* 37,) *Smith v. Bursh*, (8 *Johns. R.* 84,) *Fenton v. Garlise*, (8 *Johns. R.* 194,) *Pauling vs. Bird's Executors*, (13 *Johns. R.* 192,) *Borden vs. Fitch*, (15 *Johns. R.* 121,) and *Bissell vs. Briggs*, (9 *Mass. R.* 462.) In the two last cases, the learned Chief Justices of *New York* and *Massachusetts* reasoned out the doctrine with great acuteness and ability. The principles of the common law (which are never to be lost sight of in the construction of our own statutes) proceed yet farther. In general, it may be said, that they authorize no judgment against a party, until after his appearance in Court. He may be taken on a *capias* and brought into Court, or distrained by attachment and other process against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice, and regular personal appearance in Court.

The conclusion, to be deduced from the foregoing considerations, which must necessarily have been in the contemplation of the framers of the judiciary act of 1789, is, that the whole structure of that act proceeded upon the supposition, that, independent of some positive provision to the contrary, no judgment could be rendered in the Circuit Court against any person, upon whom process could not be personally served within the District. This was the natural result of the principles of the common law in relation to jurisdiction and process.

In this view of the matter, the clause in the 11th section already cited was introduced, as my brother *Washington* supposes it to have been, from abundant caution, to guard against every possibility of latent doubt. And it should be remembered in this con-

nexion, that the process act of 1789, which alone gave life to the state process in the *United States* courts, formed no necessary part of the system, and was brought forward by an independent and temporary statute.

Let us, then, consider, what is the true interpretation to be put upon this clause. It first provides, that "no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court." So that it is clear, that the process of *capias* is limited to the local boundaries of the Court, by which it is issued. It next provides, that "no civil suit shall be brought before either of said Courts *against an inhabitant of the United States* by any original process in any other district than that, whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

Now the argument is, that this last provision applies only to persons, who, at the time of the suit are *inhabitants of the United States*. It is a restriction of the general authority of the Courts to bring before them by original process any person, who, as a citizen or alien, was amenable by the general grant of jurisdiction to these courts. *Swan* was either an inhabitant of *Massachusetts* at the time, when the present suit was brought, or he was not. If he was an inhabitant, then the suit is brought in the proper district; if not an inhabitant, then the restriction is inapplicable to him. Such is the dilemma, into which the argument supposes the adverse party to be driven, and on which it seeks to suspend him.

It appears to me, that such is not the true interpretation of the words of the clause. They admit of an interpretation, in my view, much more natural, and consonant with the principles of justice. The argument supposes, that as a general jurisdiction is given in cases, *where an alien is party*, if he is not an inhabitant of the *United States*, and has not any property within it, (for to this extent it must reach,) still he is amenable to the jurisdiction of any Circuit Court, sitting in any state in this Union. So that a sub-

ject of *England*, or *France*, or *Russia*, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts. Such an intention, so repugnant to the general rights and sovereignty of other nations, ought not to be presumed, unless it is established by irresistible proof. My opinion is, that Congress never had any such intention; that it presupposed, that no suit would lie against any person, who was not locally present, either as an *inhabitant*, or *in transitu* in the *United States*; and that it designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicil, as well as allowed it in any district, where the party might, at the time, be found. The words of the clause are, "against an inhabitant of the *United States*." But I lay no particular stress upon the word "inhabitant," and deem it a mere equivalent description of "citizen" and "alien" in the general clause conferring jurisdiction over parties. A person might be an inhabitant, without being a citizen; and a citizen might not be an inhabitant, though he retained his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi*, quite another. I read, then, the clause thus: "No civil suit shall be brought before either of said Courts *against an alien or a citizen*, by any original process, in any other district than that, whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ." It cannot be presumed, that Congress meant to say, that if an alien or citizen were not an inhabitant of, or commorant in the *United States*, a suit might be maintained against him in any district, and process served abroad upon him, or a judgment given against him without any notice or process served upon him. If it be said, that process may be served upon his property within the district, what is to be done, when there is no such property to be found, or it is merely nominal? If in the latter cases an exception is to be implied upon general principles,

why not in the former ? The judiciary act of 1789, ch. 20, has not provided for either case in terms ; and the right to serve process upon the property of the party, and thereby to bring him into Court, when an absentee, so as to bind that property, or him personally, by the judgment, is not a right growing out of the common law, but every where, at least in countries governed by the common law, depends upon statute regulations. Looking, therefore, to the plain tenor of this act, and construing it by the real objects, which it avows, my judgment is, that it contemplates no effective exercise of jurisdiction by the Circuit Court, except in cases where the party defendant is an inhabitant of, or found within, such district, at the time of serving the writ. If no forms of process or modes of proceeding had been prescribed by any other law, I do not see, how the courts could have exercised their jurisdiction at all, except by reference to writs, process, and service according to the common law, a construction, which seems naturally to flow from the provisions of the 14th section of the act.

The process acts of 1789, ch. 21, and of 1792, ch. 36, have prescribed the forms of process, and modes of service, to be according to the state jurisprudence. But they do not appear to me to be intended to enlarge the sphere of jurisdiction of the Circuit Courts. Whenever the person is an inhabitant of, or found within, the District, the proper writ may issue, and the process may be served against him, whether it be a *capias*, summons, attachment, or otherwise, as the local jurisprudence authorizes. I cannot judicially say, that the general phraseology of these process acts ought to receive a more extensive interpretation, so as to break down or interfere with the policy of the judiciary act of 1789, ch. 20, founded, as it seems to me to be, in principles of public law, public convenience, and immutable justice. If the state jurisprudence authorizes its own Courts to take cognizance of suits against non-residents, by summoning their tenants, attornies, or agents, or attaching their property, whether

it be a farm or a debt, or a glove, or a chip, it is not for us to say, that such legislation may not be rightful, and bind the State Courts. But when the Circuit Courts are called upon to adopt the same rule, it ought to be seen, that Congress have, in an unambiguous manner, made it imperative upon them. There is no pretence to say, that the Circuit Court in this district has by its practice, or by rule, sanctioned such a proceeding. If such modes of service have in such cases been used, the matter has passed *sub silentio*, without any knowledge on the part of the Court, which implied a sanction of it.

No case has been cited, in which the question has been brought directly before any Court of the *United States* for a decision. In *Hallingsworth vs. Adams*, (2 *Dall. R.* 396,) there was a foreign attachment in the Circuit Court of *Pennsylvania*; but the principal debtor was an inhabitant of *Delaware*, and not found in *Pennsylvania*; and the Court quashed the writ for want of proper jurisdiction. In *Pollard vs. Dwight*, (4 *Cranch*, 421,) the plaintiffs were citizens of *Massachusetts* and *Connecticut*, and the defendants were citizens of *Virginia*, and not found in the district of *Connecticut*, and were sued in a foreign attachment in the State Court, and the cause removed by them into the Circuit Court for the district of *Connecticut*. The question was, whether they could be so sued. The Supreme Court held, that "by appearing to the action, the defendants in the Court below placed themselves precisely in the situation, in which they would have stood, had process been served upon them, and consequently waived all objection to non-service of process." This was a strong case; for though the suit was between citizens of different states, yet within the terms of the 11th section of the act of 1789, it was not a suit between a citizen of the state, where the suit was brought, (for the plaintiffs were partly citizens of *Connecticut*, and partly citizens of *Massachusetts*,) and a citizen of another state. *Shute vs. Davis*, (1 *Peters' Circ. R.* 431,) and *Craig vs. Cummins*, (*ibid. note*,) turned on the very words of the statute just cited. The

suit in the former case was brought in *Pennsylvania* between citizens of *New York* and *New Jersey*; in the latter, one of the defendants was a citizen of *Pennsylvania*, and the other not; but the contract being joint and, by the local law, capable of being pursued against one only, the severance was deemed complete by the return of *non est inventus* of the non-resident. *Fisher vs. Consequa*, (2 *Wash. Cir. R.* 382,) was a foreign attachment against a non-resident *Chinese* merchant; but there seems to have been a general appearance for him, and at all events no exception was taken on this particular point. In *Bissell vs. Horton*, (3 *Day's Cases*, 281,) in the Circuit Court in *Connecticut*, the plaintiffs were described as partly citizens of *Vermont*, and partly citizens of *Connecticut*. The defendant was described as a citizen of *New York*, now dwelling in *Hebron* in *Connecticut*. The Court held, that they had no jurisdiction, and on motion dismissed the suit. Mr. Justice *Livingston* said, "the plaintiffs are partly in *Vermont* and partly in *Connecticut*. They are not, therefore, citizens of *Vermont* within the constitution and laws of the *United States*. With regard to the defendant, it is admitted, that he now resides in *Connecticut*, and has resided here during the time, in which he has been in possession of the demanded premises, which clearly evinces a determination in him to remain here permanently." This case may, from the shape given to the opinion of the learned Judge in the report, be open to some critical observation. Upon the motion to dismiss, the citizenship of the defendant in *New York*, as alleged in the writ, must have been taken to be true. The process was duly served upon him in *Connecticut*. And upon the authority of *Pollard vs. Dwight*, (4 *Cranch*, 421,) the jurisdiction was maintainable; for the citizenship of one of the plaintiffs in *Connecticut* was there thought sufficient to bring the case within the act of Congress.

I have not met with any other cases, in which the question has been judicially discussed, except *ex parte Graham*, (3 *Wash. Cir. R.* 456,) already referred to, where the reasoning, so far as

it bears at all on this subject, presents itself unfavourably to the maintenance of the present suit.

If, therefore, I were called upon to decide this case exclusively upon principle, my judgment would lead me to adopt these conclusions :—That by the general provisions of the laws of the *United States*, the Circuit Courts could issue no process beyond the limits of their districts : That independent of positive legislation, the process can only be served upon persons within the same districts : That the acts of Congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts : That the right to attach property to compel the appearance of persons can properly be used only in cases, in which such persons are amenable to the process of the Court in *personam*, that is, where they are inhabitants, or found within the *United States* ; and not where they are aliens or citizens resident abroad at the commencement of the suit, and have no inhabitancy here.

There are two reasons, which have great weight with me in support of these positions. One is, that otherwise the judgments in the Courts of the *United States* would not, in cases of non-residents, be binding, as general judgments in *personam* ; but if at all, only as proceedings *in rem* to the extent of the property attached, whether it be a chip, or a bale of goods, upon the principles of the cases of *Bissel vs. Briggs*, (9 *Mass. R.* 462,) *Buchanan vs. Rucker*, (9 *East*, 192,) and other cases before mentioned. Another is, that the forms of process in *Massachusetts*, (which forms are made applicable by the acts of Congress to the Courts of the *United States*,) both in the common process and the trustee process, whenever goods or estate are attached, require a summons to be served on the party. In the trustee process, the words are, “ We command you to attach the goods and estate of *A. B.* [the defendant] to the value of —— and

summons the said *A. B.* [the defendant] *if he may be found in your precinct [district], to appear, &c.*" Not one word is stated in the writ itself, as to any summons, where the party is not found within the precinct or district of the officer. The mode of service in such cases, and in cases of non-residence generally, is prescribed by other distinct acts or sections of acts. So, that the exigency of the writ looks only to the fact of the party being found within the district; and unless the marshal is at liberty to make a service in a case and mode beyond the exigency of this writ, not expressly reached by the acts of Congress, but dependant entirely upon state laws, made for local purposes, the service in cases of non-residence would be utterly void. The argument for the plaintiff is, that as the summons is authorized by law, it is sufficiently served by the marshal in any mode, within his district, which the local laws justify. Generally speaking, that may be true, where the party is within the district, or an inhabitant bound to obey the summons within the district, *vis et modis* prescribed by the law. The difficulty is, how to deal with cases, where the party is an alien, or a citizen of another state, not resident within any of the *United States*. Yet the state laws extend to all these cases equally with those, where the party is a non-resident citizen of the state, where the suit is brought. I know no principle, upon which the Court can say, that the service as to the latter shall be good, and not as to the former; for in each case the sufficiency of the service of the summons must stand upon the same provisions of the state laws. Unless, therefore, the Court can say, that an alien, who has never been within the *United States*, may be rightfully served with a summons or other process by any attachment of his property, however small, within the district, and be bound thereby to appear and submit to the jurisdiction of the Court, or otherwise have a judgment against him *in invitum*, I do not perceive, how the present case can, on general principles, be maintained. If Congress had prescribed such a rule, the Court would certainly be bound to follow it, and

proceed upon the law. The point of difficulty is, whether such a rule ought to be inferred from so general a legislation as Congress has adopted, not necessarily leading to the conclusion, that such was the intent. It would seem strange, that a provision should be so solicitously made for persons inhabiting the country, that they should not be held amenable, except in the districts, where they resided ; and yet that no protection should be afforded to aliens or citizens, who were permanently domiciled abroad.

But supposing the preceding reasoning less well founded than, in my judgment, it seems to be ; it remains to consider, whether, under the circumstances of this case, the service of the process was such, as by the local laws, would justify the judgment of default now asked of this Court.

We may lay out of the case all consideration of the service, so far as relates to the provisions of the trustee act of 1794, ch. 65, because the trustees having been discharged, no judgment can, by the express provisions of the act of 1798, ch. 5, be rendered against the principal, unless the service has been such, as would authorize the Court to proceed to render judgment against him in an action commenced by the common and ordinary mode of process. The mode of service in the common process is provided for by the act of 1797, ch. 50, already cited. In cases of attachment, a summons is required to be left at the "*dwelling-house, or place of last and usual abode*" of the defendant, and "in case the defendant was at no time an inhabitant or resident within this commonwealth, then such summons to be left with his or her tenant, agent, or attorney." It appears to me, that the plain intent of the statute is to apply the words of the first clause exclusively to cases, where the defendant was at the time of the suit an inhabitant or resident of the commonwealth, having a *dwelling-house, or place of last and usual abode* therein. Where a defendant has no such inhabitancy or residence, but has left the commonwealth, and changed his domicil, how can it be said, that he has a dwelling-house there, or a place of *last and usual*

abode? These words "*last*" and "*usual*," (not *last or usual*,) refer to cases, where the party has had several residences within the commonwealth. To make the service good, the last residence, if it be the usual residence of the party, is the proper place at which the summons is to be left. If the party has no place of *usual* abode in the commonwealth at the time, the statute has not made the service at the place of his *last* abode sufficient. Both must concur. And there is sound reason in this provision; for otherwise it might happen, that if the party were at one time an inhabitant, and afterwards should change his domicil, and become a citizen of another state, or have his home and usual and constant place of abode abroad for any length of time whatsoever, his property might be attached here, and without any notice to him, or to any agent or attorney, a judgment might be obtained against him, binding the property attached for ever. So monstrous and mischievous a provision could hardly be deemed a just exercise of legislative power in any civilized country. The second clause applies wholly in terms to defendants, who have been *at no time* inhabitants or residents within the commonwealth. Now the writ itself negatives the presumption, that *Swan* is in this predicament. It describes him as now commorant at *Paris*, but *of the city of Boston*; so that his inhabitancy or residence at some time, in the commonwealth, is distinctly averred. The return of the marshal states, that such inhabitancy has not been within three years. So that the case before the Court is of a defendant, who has once been an inhabitant, and for three years last past has ceased to be an inhabitant. No mode of service is provided for in such a case by the statute of 1797, ch. 50; and the trustees having been discharged, it is not provided for by the act of 1794, ch. 65. It is a *casus omissus*. In respect to the service of process in such a new and extraordinary manner, varying so much from the principles and practice of the common law, and in many instances so little consonant to the principles of public law, or general justice, there can be no

ground to extend the statute provision by implication or equity. The State Court itself has not so construed them ; and in the cases of *Tingley vs. Bateman*, (10 *Mass. R.* 344,) *Lawrence vs. Smith*, (5 *Mass. R.* 362,) and *Gardner vs. Barker*, (12 *Mass. R.* 36,) has been disposed rather to narrow down than widen the means, by which non-residents are to be brought within the sphere of our process. It appears to me, therefore, that as the service of the summons on an *agent* is not authorized, except where the defendant has at no time been an inhabitant or resident, such service is void ; and as no summons was in fact left at any place of abode of the defendant, either last or usual, in the Commonwealth, there has been no compliance with the other branch of the statute. Either way, therefore, the service is, according to the local laws, defective and nugatory.

There is another defect in the description of the writ, which would be fatal, if every other were surmounted. *Swan* is not described to be a citizen of *Massachusetts*, or of any particular state, but only as “*a citizen of the United States.*” Now, such a specific description is, according to the known course of decisions, indispensable to give the Circuit Courts jurisdiction. Although the judiciary act of 1789 has given to the Circuit Courts jurisdiction of causes, where “*an alien is a party ;*” yet this must be construed and controlled by the provisions of the constitution itself. The latter does not extend the judicial power of the *United States* to such an extent, but limits it to controversies between *citizens of a state*, and *foreign citizens* or *subjects*. Hence the uniform interpretation of the act of 1789 has been, that if an alien is one party, a citizen of some particular state must be the other party. The constitution does not recognize such a description of persons as “*citizens of the United States,*” as the objects of its judicial power. The Circuit Courts have no jurisdiction of suits between aliens, or between persons having no other description than “*citizens of the United States.*” A citizen of one of our territories is a citizen of the *United States* ;

but he is not by law entitled to sue, or be sued in the Circuit Courts of the *United States*. This doctrine was settled at an early period in the Circuit Courts, as appears from the case of *Irving vs. Frazier*, (*Story's Plead.* 9,) and other cases cited in the note to *Rea vs. Hayden*, (3 *Mass. Rep.* 24, 25,) and has been affirmed in the Supreme Court in *Hepburn vs. Ellzey*, (2 *Cranch*, 445,) and *Montalet vs. Murray*, (4 *Cranch*, 46.)

Upon the whole, in every view, which I have been able to take of the present case, it is the duty of the Court to stay further proceedings, upon the ground, that there has been no sufficient service of the process to compel the appearance of *Swan*, or authorize a judgment of default against him.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM 1828, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN PITMAN, District Judge.

TOMBECKBEE BANK *vs.* DUMELL & LYMAN.

A bill drawn upon a partnership, but not accepted until after a dissolution of the partnership publicly announced, binds only the partner, who accepts it, and not the other partners, who have not consented thereto.

ASSUMPSIT on a bill of exchange drawn on 17th of March, 1827, in *Alabama*, by *Stone, Ellis & Co.*, at sixty days' sight, on the defendants, for \$ 3000, payable to *Moses Sewall* or order, and by him indorsed to the plaintiffs. The declaration averred a presentment for acceptance, and an acceptance and subsequent non-payment. There were other counts on other similar bills. Plea, the general issue.

At the trial, the sole defence relied on was, that the acceptance was made by *Jacob Dumell* after the dissolution of the partnership between him and his co-defendant, *John Lyman*. It appeared in evidence, that the firm was dissolved on the 1st of January 1827 ; but it was not advertised in the newspapers until the 5th of April 1827, when it was published at *Providence*, where

Tombeckee Bank vs. Dumell and Lyman.

the firm carried on business. The acceptances of all the bills were after the dissolution was so advertised.

STORY J. Upon this statement of facts, which is not controverted, I am of opinion, - that the plaintiffs are not entitled to recover. No partner has any authority after a dissolution of the partnership, to bind his copartners by any new contract. The acceptance of these bills is altogether a new contract. It is true, that if the partnership is still ostensibly carried on in the name of the firm, and no public notice is given of the dissolution of the partnership, though it is secretly dissolved, third persons, dealing with the firm upon the faith of the partnership and joint responsibility, are entitled to hold all the partners. But it is otherwise, where the dissolution is made public. Here, before the acceptance, the dissolution was publicly announced. The partners had not held out to the payee, or the present holders, that they would accept the bill. Every non-accepted bill is necessarily taken upon the faith and credit of the drawer; and no person can bind the drawee by his acceptance, except a person having an express or implied authority for that purpose. After the dissolution of the partnership, and a public notice of it, there was a withdrawal of all such authority; and consequently the acceptance, as to *John Lyman*, is void. Upon principle then, the action, being joint upon a joint acceptance, fails as to both.

Mem. By consent of the parties, the plaintiff discontinued as to *Lyman*, amended his declaration, and took a judgment against *Dumell* alone.

William A. Burgess for the plaintiff. *Richard N. Greene* for the defendant, *Lyman*. *Thomas Burgess* for *Dumell*.

DAVID THATCHER vs. ANDREW WINSLOW.

An agent, to whom a negotiable note has been indorsed by his principal for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note.

No person can sue as indorsee, unless he be the owner of the note or has some legal or equitable interest therein.

ASSUMPSIT on certain notes made by *Lewis Rousmaniere*, payable to the defendant or his order, at the *Merchants Bank* in *Newport*. The declaration contained various counts against the defendant, as indorsee, in favour of the plaintiff, as indorser.

Plea, the general issue.

At the trial, the defence turned principally upon the point of forgery of the defendant's name, as indorser, by *Rousmaniere*. Another point was made, viz. that the plaintiff was not the owner of the notes in question, but that they belonged to the *Merchants Bank* at *Newport*, by which bank they were originally discounted; and that the notes, since the death of *Rousmaniere*, (who committed suicide,) had been delivered to the plaintiff by the *Merchants Bank* for the purpose of suing the same in his own name in the Circuit Court; and that plaintiff had no interest whatsoever therein.

A witness, called for the plaintiff, upon his cross examination, fully established the latter point.

STORY J. If the facts stated by the witness on this last point are not denied, I think the cause is at an end. Unless the plaintiff is a real holder of the note, and has some interest in it, he cannot maintain an action as indorsee against the defendant. Here the proof is, that the *Merchants Bank* is the real holder, and the plaintiff is merely an agent for the bank. I take it not to be competent for a mere agent to maintain an action on a negotiable note in his hands, although it be with the consent of his principal. He must be the owner of the note, or have some

Thatcher vs. Winslow.

substantial interest therein. *Primâ facie* indeed the possession of such a note is evidence of the party's being a holder for a valuable consideration, and unless the note has been previously stolen, or received by him under suspicious circumstances, he is not bound to prove by other evidence, that he is such a *bonâ fide* holder. But if it is admitted or proved *aliunde*, that he is but a mere agent, and holds the note as such, he is not competent to recover a judgment upon it in his own name.¹

The plaintiff discontinued his suit.

TOWN OF PROVIDENCE vs. MARY MANCHESTER.

A bill in equity was brought against a *feme sole* to compel her to make an acknowledgment of a deed, made by her and her late husband in his lifetime, of her land, on a sale thereof. In her answer, she denied all equity; and asserted, that the sale was without her consent, and that she received no part of the consideration money. It was *held*, that the plaintiffs were not entitled to any relief.

THIS was a bill in equity against the defendant, for an injunction to a suit brought in this Court to recover certain land belonging to her, of which a deed had been executed by herself and her husband in his lifetime, on a sale thereof to the plaintiffs. The acknowledgment had not been taken in the form prescribed by the act of *Rhode Island*, (*Digest of 1798*, p. 267, § 7,) so that it was incompetent to bind her. There was also a prayer for general relief.

The answer denied all equity; and asserted, that the defendant had received no part of the purchase money; that the sale was on her part involuntary, and under the influence of her husband; that she did not know the contents of the deed; that she never

¹ See *Gunn vs. Cantine*, 10 Johns. R. 387.—*Gilmore vs. Pope*, 5 Mass. R. 491.

 Providence vs. Manchester.

made any contract for the sale ; and never intended to make any acknowledgment, unless forced to it.

The cause was set down for argument upon bill and answer.

The cause was shortly argued by *Whipple* and *Searle* for the plaintiffs, and by *Crapo* and *Richmond* for the defendant.

STORY J. The answer denies all equity. No contract was made for the sale with the defendant ; she received no part of the purchase money ; and now insists, that the acknowledgment, such as it is, was involuntary on her part, and produced by the influence of her husband. Under these circumstances, standing wholly uncontradicted, there can be no decree for an injunction or any other relief. The bill must therefore be dismissed with costs.

Bill dismissed accordingly.

NATHAN CARR vs. JOSEPH HOXIE.

A delivery of a deed is essential to its validity. If it be delivered as an escrow on conditions, those conditions must be complied with before it can take effect, as a deed.

If an instrument be signed and sealed by the grantor, but is left with a third person, without any express or implied authority to deliver it to the grantee, it is not presently the deed of the grantor.

EJECTMENT for a tract of land in *West Greenwich*. Plea, the general issue.

At the trial, the plaintiff proved a title to the premises by a deed from *Simon Reynolds* to him, dated the 18th of July, 1826, the execution of which was established. The defendant then set up a title to the premises under a prior deed from the same grantor, dated the 26th of May, 1826. The execution of this deed being disputed, a witness, *Jonathan Nichols*, was called by the defendant. He testified, in substance, that he was called

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upon by the parties to write the deed :—that he saw the grantor, *Reynolds*, sign and seal the same ; and that *Hoxie* at the same time executed a deed of mortgage of the same lands to the grantor. The witness drew both deeds. The parties then had some conversation about the deeds, and about the fulfilment of certain conditions before they should be passed. They finally concluded to leave them both with him. But they did not authorize him to deliver either of them to the other upon the fulfilment of any conditions,* nor did they deliver them to him for that purpose. Nor did he consider that he had any authority over the deeds. He made a memorandum at the time of the conversation between the parties, and afterwards gave a copy of it to *Hoxie* at his request. He supposed, that when the parties had adjusted all the conditions, and they were complied with, they would call on him together for the deeds ; but that he had otherwise no authority to deliver them. There was no delivery of them in his presence. This was the whole case for the defendant.

STORY J. Upon this evidence, I do not see, how the defence can be maintained. Here, there was no delivery of either instrument to *Nichols*, as the deed of the party, or as an escrow, to take effect upon the fulfilment of the conditions or agreements stated. Even supposing those conditions or agreements to be fulfilled, still the land will not pass, unless there has been an effectual delivery of the deeds with the assent of the parties respectively.¹ The plaintiff is therefore entitled to recover upon the consummated title to him, subsequently made.

Verdict accordingly.

Tillinghast for the plaintiff; *Bridgham* and *Whipple* for the defendant.

¹ See *Degory and Roe's case*, 1 Leon. R. 152.—S. C. Moore, 300.—*Wheelwright vs. Wheelwright*, 2 Mass. R. 447, 452.—*Johnson vs. Baker*, 4 Barn. & Ald. 440.—*Perkins*, § 137, 138, 142, 143, 144.—*Bushell vs. Pasmore*, 6 Mod. R. 217, 218.

 United States vs. Hunter.

UNITED STATES vs. WILLIAM HUNTER.
and Cross Bill
FREDERICK CRARY vs. WILLIAM HUNTER.

A claim of a person to compensation for wrongs done under *Spanish* authority, and provided for by the Treaty of 22d of February 1819, with *Spain*, passed to his general assignee upon his insolvency.

A surety on a custom-house bond, who has paid it, has the same priority, as the *United States*, against the estate of his principal in the hands of his assignee.

If such surety become insolvent, and the same person is assignee of both estates, the funds of the principal to the extent of the debt due such surety, as a priority creditor, is, by operation of law, deemed assets of the surety; and if the latter is also indebted to the *United States* for other debts, the *United States* may, by a bill in equity against the assignee, ensure its priority out of such fund or assets.

If under the act of 24th May, 1824, ch. 140, § 2, the secretary of the treasury omit to retain the amount of debts due to the *United States* from a person entitled, by an award under the *Spanish* treaty, to money provided for payment of such award, it does not prejudice the right of the *United States* to proceed for payment of such debts against the general assignee, who has received the money from the treasury.

THESSE were bills in equity, which were set down for a hearing upon the bills, answers, and exhibits. The defendant, *Hunter*, as assignee under the insolvent act of *Rhode Island*, of *Archibald* and *Frederick Crary*, had recovered, under the 11th article of the treaty with *Spain* in 1819, by the award of the commissioners, for a claim of *Archibald* and *Frederick Crary*, the sum of \$ 8158 and 81 cents, which sum had since been received by him from the treasury of the *United States*. The object of the bill brought by the *United States* was to obtain payment of certain debts due to them from one *Jacob Smith*, upon which they had recovered judgments, and for which this fund was alleged to be liable. The object of the cross bill of *Frederick Crary* was, to have the same money paid to him, as surviving partner of *A. & F. Crary*, upon the ground, that the claim, for which the money was awarded, never passed by their assignment, and that the money awarded belonged therefore to him.

Both causes came on to be heard together; and the material facts and circumstances were as follows:—*A. & F. Crary* were

merchants in *Rhode Island*, and became insolvent in 1809, and in June of the same year, were discharged under the insolvent act of that state; and upon that occasion they made an assignment of all their estate and effects to the defendant, *Hunter*, and one *John Meer*, since deceased, who were appointed assignees. In February 1808, a judgment was recovered against *Jacob Smith* by the *United States* upon a custom-house bond, executed by him as surety of the *Crarys*, for the sum of \$ 2064,06, and interest and costs, which was paid by *Smith*. In August of the same year, another judgment was recovered against him and one *Dockray*, for \$ 347,50, and interest and costs, upon another custom-house bond, executed by them as sureties of the *Crarys*, one half of which judgment was paid by *Smith* and one half by *Dockray*. Soon afterwards *Smith* became insolvent, and in February 1810 he obtained the benefit of the insolvent act of *Rhode Island*, and subsequently made a like assignment of all his estate and effects to the defendant, *Hunter*, and one *William Littlefield*, since deceased, who were appointed his assignees. This assignment bears date on the 3d of September 1811. The inventory annexed to it contains, as part of the property assigned, "one custom bond paid of *Archibald Crary* and son, (that is, *A. & F. Crary*,) for \$ 2125." *Smith* and one *William M'Gee* were also sureties for one *William Peck*, the marshal of *Rhode Island*, and supervisor of the internal taxes &c. in that state, on his official bond to the *United States*, on which the *United States* obtained judgment in August 1811 for the sum of \$ 13580,59 against *Peck* and *Smith*. An execution issued on that judgment on the 16th of September 1811, returnable to the next term of the District Court of the *United States* for *Rhode Island* district, on which *Smith* was committed to gaol on the 17th of September 1811. On the same day *Smith* (he having previously applied to the then secretary of the treasury for that purpose, by a petition stating the facts,) was, by order of the secretary of the treasury, in virtue of

the authority of the act of 6th of June 1798, ch. 66, discharged from imprisonment; and on that occasion he executed to the *United States* an assignment of all his estate and effects, and annexed thereto a copy of the same schedule of his estate, which was delivered with his assignment under the insolvent act, the latter assignment being then fully known to the officers of the government. That schedule referred to the debt of the *Crarys*, as above stated. Afterwards the *United States* imprisoned *William Beck* (the principal) on the same judgment; from which imprisonment he was discharged by an act of Congress, passed on the 24th of June 1812, ch. 104; and he then executed an assignment of all his estate and effects, in conformity with the requirements of that act.

The bill of the *United States*, after charging the material facts, prayed satisfaction of their debt and judgment against *Smith*, out of the proceeds now in the hands of *Hunter*, upon the ground of the priority of the *United States* to payment out of the assets of *Smith* in his hands, and his (*Smith's*) priority of payment out of the funds of the *Crarys* received by *Hunter*, which attached thereto by operation of law.

The cause was argued upon these facts by *Hunter* for himself, and by *Greene* (District Attorney) for the *United States*.

STORY J. - Some of the questions intended to be discussed in this case have been already settled by the recent decisions of the Supreme Court. In the first place the point, upon which the cross bill is founded, is, whether this claim of the *Crarys* was assignable, and if assignable in its own nature, whether it passed under the assignment, by force of the insolvent act, to the assignees. Upon that I need say no more, than that *Comegys vs. Vasse*, (1 *Peters' Sup. Ct. R.* 143,) has completely settled the doctrine in the affirmative. I have not the least difficulty, therefore, in saying, that the cross bill of *Frederick Crary* must be dismissed.

Then as to another point, viz. that the discharge of *Peck* from imprisonment, by the secretary of the treasury, under the act of Congress of the 24th of June 1812, ch. 104, was a discharge of his sureties from the judgment obtained against them. The act of Congress, after authorizing the discharge of *Peck* from imprisonment upon his executing an assignment of his estate under the direction of the secretary of the treasury, provides, "that any estate, real or personal, which the said *William Peck* may hereafter acquire, shall be liable to be taken in the same manner, as if he had not been imprisoned and discharged." The sole object of the act was a discharge of the party from imprisonment, and not a discharge of the judgment itself, upon which he was committed in execution. The debt was to remain in full force as to all intents and purposes, except imprisonment of the party. The case, therefore, falls within the authority of *United States vs. Stanbury*, (1 *Peters' Sup. Ct. R.* 573;) and the judgment was not discharged in favour of *Peck*, and consequently not discharged in favour of his sureties.

Then upon the general merits, what are the objections to a recovery on the part of the *United States*? The money received by *Hunter*, as assignee of the *Crarys* under the award, was received for, and was distributable among, their creditors according to the priority, as established by law. *Smith* had paid a custom-house bond, as surety for the *Crarys*, to the amount of \$ 2125, in May 1808, and to this amount he was entitled to the same priority, which the *United States* would have possessed, if the bond had remained unpaid. That is the express provision of the 65th section of the revenue collection act of 1799, ch. 128. *Hunter* being also the assignee of *Smith*, must, by operation of law, be deemed to hold so much of the fund, as this priority of *Smith* attached to, as part of *Smith's* estate. In this view, the priority of the *United States* upon their judgment and debt against *Smith* re-attached to the same fund, as part of *Smith's* estate in the hands of his assignee, which was distributable among his

creditors, independently of the special assignment made by *Smith*, when he was discharged from his imprisonment. There is no pretence to say, that this discharge operated any satisfaction of that judgment.

Then it is suggested, that by the act of 24th of May 1824, ch. 140, § 2, creating five millions of stock, and appropriating the proceeds of it to the payment of the claimants, to whom money was awarded under the treaty with *Spain*, the *United States* reserved and secured to themselves the right or power to withhold the allotted compensation from their debtors, unless the amount due to the *United States* was first deducted or paid ; and that full payment was made to *Hunter*, the assignee, without claiming or making any such deduction. This certainly does not vary the legal rights of the *United States*, for the fund received is still to be distributed according to law among the creditors ; and here the *United States* are creditors, and have a right of priority of payment. The mere omission to withhold payment was no legal waiver of right of priority ; still less an extinguishment of the debt.

The clause alluded to is as follows :—“ Provided also, that in all cases, where the person or persons, in whose name, or for whose benefit and interest, the aforesaid awards shall be made, shall be in debt and in arrears to the *United States*, the secretary of the treasury shall retain the same out of the amount of the aforesaid awards in the first instance, and a warrant or certificate, as the case may be, shall issue only for the balance.” The omission of the secretary to do his proper duty under this act, if there was any, which, as *Smith*, and not the *Crarys*, was the debtor, may be doubted, proceeded from mere mistake, and from want of a due knowledge of all the facts, and cannot prejudice the general rights of the *United States*, derived from other laws, or extinguish the debt due to them. The fund so received by the assignee, *Hunter*, must still be distributed according to law among the creditors. And we have already seen, that through *Smith's* priority on the estate of

the *Crarys* the priority of the *United States* attaches to that part of the fund belonging to *Smith* in *Hunter's* hands, and must be distributed accordingly.

The *United States* are therefore entitled to a decree for an account; and a reference must be made to a master to ascertain and report accordingly.

MARY MANCHESTER vs. JOHN B. HOUGH AND OTHERS.

By the statute of *Rhode Island* respecting conveyances of real estate, no deed of the wife's estate by the husband and wife, conveys any title but that of the husband, unless the same deed be duly acknowledged by the wife, before a magistrate, in the manner prescribed by the statute.

By the customary and ancient law of *Rhode Island*, a feme covert may pass her estate by a deed, in which her husband is joined, which is duly executed and acknowledged.

EJECTMENT for certain lands in *Providence*. Plea, the general issue. The town of *Providence*, under whom the defendants claimed, took upon themselves the defence.

The facts, as they appeared at the trial, were as follows:—On the 30th of September 1797, *Isaac Manchester* (since deceased) and *Mary Manchester*, his wife, (the present plaintiff,) were seized in fee simple, in her right, of the demanded premises. On the same day, they conveyed, by their deed of that date, to *Samuel Nightingale*, the treasurer of the town of *Providence*, for the use of the town, one portion of the lands in controversy, to hold to him and his successors in the office forever. This deed was, on the same day, acknowledged by the grantors to be their voluntary deed, before G. T., a justice of peace of the same town. On the 4th of May 1799, the said *Isaac* and *Mary* made a conveyance by deed of that date, of the residue of the demanded premises to the same treasurer, in like manner for the use of the town of *Providence*; which deed was acknowledged

in the same manner. At the time of executing the first deed, there was no statute in *Rhode Island* authorizing a feme covert to convey her lands by deed, joining her husband therein.

The question was, whether the deed of 1797 operated as a legal conveyance of the wife's estate. The acknowledgment of the deed of 1799 was admitted not to be according to the provisions of the statute of *Rhode Island* of 1798 on this subject.

The cause was argued by *Richmond* and *Crapo* for the plaintiff, and by *Bridgham* and *Searle* for the defendants.

STORY J. This case depends upon the validity of the conveyances made of the wife's estate by herself and her late husband, by the deeds of 1797 and 1799. It is admitted, that the latter deed cannot bind the wife according to the statute of *Rhode Island* of 1798, § 7, (*Digest of 1798, p. 267,*) because she has not been examined *privily* and *apart* from her husband, and made an acknowledgment, that the deed was her voluntary act, and that she did not wish to retract the same, before the magistrate taking the acknowledgment. Without a compliance with these requisites, the statute declares, that the deed shall not operate to convey any greater estate in the premises, than what belongs to the husband.

The validity of the other conveyance in 1797 turns upon the question, whether, by the common or customary law of *Rhode Island*, a feme covert can convey her real estate by deed, her husband joining in the deed. It is not denied, that this was in *Rhode Island* the usual mode of conveying her estate antecedently to the statute of 1798; and that it had prevailed without objection and without question for a great length of time; and that this is the first time, in which it has been judicially brought into controversy. Conveyances by fine or common recovery of the estates of femes covert may have sometimes been resorted to by very cautious persons; but the general practice in *Rhode Island* has been, as I have stated. Many titles have passed, and

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many titles are now held exclusively under such conveyances. And to shake their validity would at this period be productive of incalculable mischiefs. If there ever was a case, in which the doctrine might be fairly applied, that *communis error facit jus*, the present is that case. In truth, from an early period in the history of *New England*, the right of a feme covert to convey her real estate by deed with the assent of her husband was recognized, and has been constantly enforced by courts of law. It now constitutes a part of the common law of *New England*.¹ It probably originated in the necessities of the country at an early period of its settlement, when fines and recoveries were little known; or if known, Courts were rarely held, and understood little of the proper mode of proceeding. The same necessity has produced a similar result in other parts of the Union.² The act of 1798 can be justly considered in no other light, than as a legislative sanction and recognition of the right and the practice. My opinion accordingly is, that the deed of 1797 is sufficient to pass the estate of the feme covert to the premises described therein.

Verdict accordingly.

¹ See *Fowler vs. Shearer*, 7 Mass. R. 14.—*Dudley vs. Sumner*, 5 Mass. R. 463.—*Colcord vs. Swan*, 7 Mass. R. 291.

² See *Lessee of Lloyd vs. Taylor*, 1 Dall. R. 17.—*Davy vs. Turner*, 1 Dall. 11.

BENJAMIN W. CASE vs. JOSHUA CLARKE.

To constitute a person a citizen of a state, so as to sue in the courts of the *United States*, he must have a domicil in such state.

If he removes into a state *animo manendi*, that is sufficient, whatever may be his motive for removal. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of domicil.

CASE for defamation. The writ averred the plaintiff to be a citizen of *Massachusetts*, and the defendant to be a citizen of *Rhode Island*. Plea to the jurisdiction, that the plaintiff is a citizen of *Rhode Island*, and not a citizen of *Massachusetts*, as alleged in the writ, and issue thereon.

At the trial it appeared, that the writ was dated on the 29th of September 1827, and was served on the 30th of the same month. The plaintiff was a physician, resident in *Newport, Rhode Island*, having his home there, and practising his profession. About the 28th of September 1827, he went with his wife to *Troy, Massachusetts*, and took lodgings in a house there at board, avowedly for a few days only, and said, that his stay was uncertain. He remained there only two days, and then returned to *Newport* with his wife, saying, that he must visit his patients in *Rhode Island*. This was the whole evidence of citizenship.

STORY J. It appears to me very clear, that there is no sufficient proof, that the plaintiff is a citizen of *Massachusetts*. To effect that purpose it should be established, that there was a *bonâ fide* change of domicil. I do not say, that we can inquire into the motives for the change, or the reasons, which influence a man to remove from one state to another. Be these motives or reasons what they may, there must still be a *bonâ fide* intention of removal, and a real change of domicil. If a person, wishing to commence suits in the Courts of the *United States*, instead of the State Courts, chooses to remove into another state, and executes such intention *bonâ fide*, he may thereby change

Case vs. Clarke.

his citizenship. But his removal must be a real one, *animo manendi*, and not merely ostensible. Now in the present case, no person can wink so hard as not to see, that the plaintiff never had any intention to change his domicile. He went to *Troy* upon a mere temporary visit, for a transient purpose, and apparently for the sole purpose of suing out and serving the present process. He returned as soon as the service was completed ; and resumed his business as usual. How can such acts, construing them most favourably for him, demonstrate any intentional change of his common domicile ? As well might a man passing into another state in the progress of a journey of business or pleasure claim to be a citizen of such state. There must be some plain overt acts establishing a real removal of domicile. The return here followed too soon upon the removal not to demonstrate, that it was merely an ostensible, and not a real change of domicile. I, for one, feel no desire to encourage attempts of this nature ; and am willing, that the State Courts should retain all the jurisdiction over causes originating between the citizens of the same state.

Verdict for the defendant.

Turner and Pearce for the plaintiff ; *Searle* for the defendant.

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C. C. HOPNER vs. JOSHUA APPLEBY.

Where a *Spanish* vessel was captured by a *Colombian* privateer, and by collusion between the captors and an *American* citizen she was purposely wrecked on a key on the coast of *Florida*, within the territory of the *United States*, and the cargo was there landed, and the duties regularly paid ; and afterwards the cargo was sold, and the *American* citizen became a purchaser thereof, and gave bills of exchange drawn by himself on a house in *Charleston, South Carolina*, which were dishonoured ; it was held, that the party was liable to be sued on such bills in an *American* court, and that the collusion between him and the captors, in procuring the shipwreck, was no bar to a recovery in such suit, as there was no fraud intended, or perpetrated on the laws of the *United States*.

ASSUMPSIT on sundry bills of exchange drawn by the defendant, payable to the plaintiff or order, on *Thomas Street & Co.*

of *Charleston, South Carolina*, and protested for non-acceptance and non-payment. The declaration contained the usual averments. Plea, the general issue.

Some of the bills were drawn at *Key Vaccas, Port Monroe*, on the 28th of May 1823, payable at sight, at thirty days' sight, and at sixty days' sight; and others, at *Long Key*, on the 15th of June of the same year, payable at thirty days' sight, and at sight.

At the trial it appeared, that the bills of exchange were given for certain wrecked goods purchased by the defendant of the plaintiff. The plaintiff was commander of a privateer, called *Le Cintella*, sailing under the flag of the republic of *Colombia*, and in the course of his cruise he captured some *Spanish vessels* laden with goods, which were brought into *Key Vaccas* and *Long Key*, on the coast of *Florida*, and within the territorial limits of the *United States*, and there wrecked. The goods were duly landed, the duties thereon duly paid and secured, and afterwards sold to the defendant, who is an *American* citizen.

The principal grounds of defence urged at the trial were, (1.) that the privateer was not regularly commissioned; (2.) that the wreck of the prizes was procured by collusion between the plaintiff and defendant, for the purpose of landing and selling the goods at *Key Vaccas* and *Long Key*, and to avoid the necessity of carrying the prize into the ports of *Colombia*, and there procuring a regular condemnation.

Searle and *Hunter*, for the defendant, contended, that if these facts were made out, the contracts were wholly illegal. If the wreck was by collusion, it was a violation of belligerent rights and duties, and against the law of nations. Assuming the original capture to be good, still the rights acquired under it might be forfeited by misconduct. No sale could be justified in a neutral port without absolute necessity. Here it was by fraud. The prizes ought to have been carried into a port of *Colombia*, and a regular condemnation obtained before any title could pass under the captures.

But the privateer was not regularly commissioned, and if so, there is no pretence of a recovery. It is a mere piratical act. The conduct of the parties is strongly presumptive of fraud.

The defendant was known to be an *American* citizen. It was an unneutral act in him to assist in collusively procuring a wreck of the prize. The plaintiff has no right to take advantage of such unneutral act. The wreck was within our neutral territory.

Hazard and *Robbins*, for the plaintiff, *è contra*, contended, (1.) that the privateer was regularly commissioned; (2.) that the wreck was not procured by collusion; (3.) if collusive, still this was no defence. The captures were legal. The wreck, if fraudulent, was by the lawful possessor and owner of the property as prize. The government of *Colombia* might complain of the act, and enforce a forfeiture against the captors for misconduct by violations of its own laws. But neutrals had nothing to do with such violations. Whether the captors sell rightly or not must be decided in the first instance by the captors themselves, and ultimately, by the courts of their own country. The courts of a neutral country have no right to meddle with the question of prize, or the sale of prizes, as between belligerents, where their own rights are not violated. Here, the duties were regularly paid, and the goods regularly landed. The captors have done us no wrong. It would be unjust to allow the defendant to pocket these proceeds.

The jury, in pursuance of the direction of the Court, found the facts specially, that the captured vessels and property were *Spanish*, and captured as enemy's property by the privateer, which was duly commissioned by the government of *Colombia*; and that the prizes were wrecked by collusion, and previous concert between the plaintiff and defendant at *Key Vaccas*, within the territorial jurisdiction of the *United States*. And subject to these facts, the jury found a verdict for the plaintiffs of \$7111,56. The question of law was reserved at the trial; and a motion was subsequently made by *Hunter* and *Searle*, for a new trial,

which was argued at the last November term by *Hunter* for the defendant, and by *Robbins* and *Hazard* for the plaintiff; and the cause was then continued *nisi* for advisement. The main ground of argument was the same as relied on at the trial.

At this term the following opinion was delivered by

STORY J. There is no longer any question, that the privateer was regularly commissioned, and that the property captured was *Spanish*, and lawfully taken as prize of war, the republic of *Colombia* and *Spain* being at that period and still at war with each other. It is as clear, that the wreck of the prize property was procured by collusion and previous concert between the plaintiff and the defendant, for the very purpose of selling the same within our territorial jurisdiction; and that the bills of exchange were given in consideration of the purchases made of the wrecked goods by the defendant. No fraud has been pretended or proved, upon the municipal or revenue laws of the *United States*. The goods were regularly landed; the duties on them duly paid or secured; and the sale made at the instance of the captors.

The whole defence then turns upon the single point, whether a purchase, made under such circumstances, is such a violation of the law of nations by an *American* citizen, as infects the whole transaction with the taint of illegality in an *American* Court.

There is no statute of our government, which prohibits the sale of prizes in our ports, or that declares wrecks, procured collusively in our ports to evade the rights or duties of foreign belligerent cruisers, civilly or criminally wrong. If such acts be illegal or criminal, that character attaches to them from the principles of the law of nations, which this country is bound to recognize and enforce, as a just assertion of its own neutrality and sovereignty.

No case has been cited, which bears out the argument urged in support of the defence; and ably and even eloquently as it has been pressed upon the Court, it proceeds upon reasoning, which admits of great question in every step of its progress.

Some principles are extremely clear, and indeed are so well settled, that nothing more is necessary to command approbation, than a simple annunciation of them. Neutral nations are bound equally by their duty and their interest to consider the existing state of things between belligerents as rightful. The right of capture by the law of war cannot be disputed, and the lawfulness of the possession thereby acquired cannot be inquired into by the tribunals of a neutral nation, with the single exception of cases, where the capture itself is an infringement of the jurisdiction or rights of the neutral nation itself. In all other cases, the question of prize or no prize exclusively belongs to the cognizance of the courts of the capturing power. The possession of the captors is to be deemed a possession *bonæ fidei*, and inviolable; and as was said by the Supreme Court in the case of the *Mary Ford*, (3 *Dall. R.* 188, 198,) immediately upon the capture the captors acquire such a right as no neutral nation can justly impugn or destroy.¹

The original ownership of the enemy is entirely divested by the capture; and though a title, good against all the world, may not be conveyed to a neutral vendee by the captors, unless there be a regular condemnation as prize, or a treaty of peace, which confirms, by implication, the existing title and state of things; yet this does not interfere with the general right of the captors to sell the property, or dispose of it as rightful proprietors *jure belli*, and possessors *de facto*. If they act in disobedience to the rules prescribed by their own sovereign, they may be personally responsible to him for their misconduct, and justly incur a forfeiture of the rights of prize. But that is a question altogether between the captors and their sovereign, and no neutral nation has either the authority or duty imposed upon it to take cognizance of, or punish civilly or criminally any such misconduct, or any irregularities, or even wanton wrongs of the captors, not in-

¹ *The Josefa Segunda*, 5 *Wheaton R.* 838, 357.

vading its own neutrality. Even in cases of the violation of neutral jurisdiction the tribunals of the injured country content themselves with a simple restitution of the property brought within its territory, and do not interfere to give damages, or inquire into the manner, in which the belligerent may have exercised his power, however harshly, upon the conquered. Strictly speaking, there can be no such thing as a marine tort between belligerents; and at all events, neutral nations have no authority to entertain any judicial cognizance of them.² They must be redressed, if at all, by the sovereign, to whom, as subjects bearing his commission, the captors are responsible for every abuse of their power.

This Court, upon these principles, is bound to disclaim any right to control the captors in the management and sale of their prizes. The capture was lawfully made in war between belligerents, recognized by our own government. It must be deemed rightful. Whether the property was ever carried into a proper port for adjudication or not, or properly condemned or not, and whether the captors have been guilty of a fraudulent breach of their duty to their own sovereign or not, are questions, upon which we have not the slightest right to pass judgment. *Spain* has no right to complain of any extent of the exercise of belligerent power on the part of her enemy. The captors had a plenary dominion over the property by the capture, and might, so far as she was concerned, have burnt it, or destroyed it, or disposed of it in any other manner, which they pleased. If, indeed, by recapture or otherwise it had again come within her reach, it would have been a very different question, whether, under the law of postliminy,³ she would have acknowledged the validity of the title of a neutral vendee, acquired by a fraudulent effort to escape from her reach, when the property had never

² See *La Amistad de Rues*, 5 *Wheaton R.* 385.

³ See 2 *Wheaton R. Appendix*, p. 40.—*The Flad Oyen*, 1 *Rob. R.* 134.—*The Cosmopolite*, 3 *Rob.* 333.

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been subjected to condemnation by a regular prize tribunal. If, under such circumstances, her Courts should have chosen to restore it to the original owners, and dispossess the neutral vendee, he at least would have had no just ground of complaint, for he took his title with his eyes open, and knew and assisted in the device. Nor could he have had any just right of compensation from the captors, because he bought the title with all its infirmities, and if there was any fraud, it was not upon him, or his rights acquired by the purchase.

Was there, then, in the present case any violation of our neutrality? It has not been asserted, that captors violate our neutrality by the mere sale of their prizes in our ports. In general, neutral nations allow them an asylum in their ports. They may, indeed, prohibit their entry into their ports, or the sale of their prizes there, from motives of policy or public convenience. But unless they do so, where is the principle of the law of nations, which prohibits such a sale? I cannot find any such principle laid down in the most approved elementary writers, or justified by the general practice of nations. It is one of those points, which every neutral nation arranges according to its own sound discretion and policy. It is free to refuse, or grant it. If there be no prohibition, the right to sell arises silently from the general operations of commercial intercourse. A *bonâ fide* possessor of property may traffic with it in every country, where the sovereign does not choose to establish a different rule. The permission results necessarily by implication from the omission of any interdicting expression of the sovereign's pleasure. Unless I have greatly misconceived the general result of the doctrines advanced on this subject by jurists of high character, that is their settled conclusion.⁴ I am aware, that at an early period, in one of the

⁴ See Grotius, b. 3, ch. 9, § 14, and Barbeyrac's note.—Vattel, lib. 3, ch. 7, § 132.—Bynk. Ques. Pub. Jur. ch. 15, (Duponceau edit. p. 113, 120.)—D'Abreu Traité sur les Prises, Pt. 2, ch. 2, § 3, 5, 6, 7, and Bonnemant's Note, *ibid.* and Pt. 1, ch. 3, § 2.—Valin. Traité des Prises, ch.

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Circuit Courts, a modification of this doctrine was insisted on, viz. that the permission of the government must be express, and could not be implied. That modification has not, to my knowledge, received elsewhere any recognition. I feel myself constrained to doubt, whether it can be supported upon the footing of the law of nations. Perfect neutrality is entirely consistent with allowing the sale of prizes in our ports in the most ample manner, if it be equally granted to all the belligerents. The only just ground of complaint in such cases would be, that, what is allowed to the one, is denied to the other. Many acts of a far more direct operation upon the success of war are not deemed unneutral, where they are granted with sincerity to all the belligerents; for equality, in such cases, is not only in a liberal sense equity, but is neutrality. Permission to sell prizes in our ports may sometimes involve the dangers of fraud, and even of piracy; but mere danger of such consequences does not establish the fact, that a prohibition is created by the law of nations, or that a positive act of the government is required to remove it.

If, then, the sale of prizes in a neutral port is not prohibited by the law of nations, what is there in the present case to taint the present transaction with illegality? No fraud has been practised upon our government or our laws. The fraud, if any, was a fraud either to evade the regulations of prize of the republic of *Colombia*, which we are not called upon to enforce, or the chances of recapture by *Spanish* cruisers, which we are as little called upon to aid. The wreck of the prize property did not disturb the operation of our revenue laws, or infract our police. The duties have been duly paid; and the custom-house regulations have been sufficiently obeyed. An *American* citizen

7, and particularly § 24; and 2 Valin. Comm. Ordon. de la Marine, Art. 14 and 15, p. 272, 273, &c.—Wheaton on Capt. ch. 9, p. 260, § 6.—Lee on Captures, ch. 16, p. 193.—Findlay vs. *The William* (1 Peters' Adm. R. 12, 21.)—Consul of Spain vs. Consul of Great Britain, Bees' Adm. R. 263.

now calls upon the Court to enable him to pocket the proceeds of prize, which he has purchased with a full knowledge of all the circumstances, and a full participation in all the intermediate acts, not because he has sustained any loss, or is willing to restore those proceeds, but because he has aided the captors in a fraud, which touches the sovereign rights of *Colombia*, or *Spain*, or both. It appears to me, that an *American* Court has no authority to intermeddle in such controversies. The title to the property was regularly acquired by the captors; they have sold that property to the defendant; he has had possession of the proceeds. There is no moral wrong in compelling him to pay the consideration of the purchase. Our judgment will not touch in the slightest degree the authority of either sovereign to seek his own redress for any wrong done to him in these proceedings. The law of nations has not pronounced a title so acquired to be an absolute nullity; and it has been long settled, that our tribunals do not sit to enforce the mere municipal regulations, or vindicate the injured sovereignty, of foreign nations.

For aught that we know, a proper sentence of condemnation may already have passed on this property. It may hereafter be passed by the prize courts of the government of *Colombia*; for a sale of prizes, however irregular before condemnation, is such a proceeding as does not oust the prize jurisdiction; but the proper court may still in its discretion interfere, and confirm the title by its definitive sentence of condemnation.⁵

It has been said, that our law upon general principles prohibits a citizen from colluding with foreigners to procure a wreck. If by this is meant a wreck, which is a fraud upon the laws or rights of our government, or upon the private rights or property of our citizens, the doctrine may be admitted; but its application to the facts of the present case is not perceived. Here, the captors

⁵ See *The Eole*, 6 Rob. 220, 224.—*The Dame Cecile*, 6 Rob. 257, 260.—*The Falcon*, 6 Rob. 194, 200.—*The Arabella and Madeira*, 2 Gal-
lis. R. 368.

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were the owners and possessors of the property ; and it will scarcely be pretended, that a wreck, procured by the connivance and consent of the owner, and not intended to cheat or defraud any third person, but merely to escape belligerent risks, falls exactly under the like considerations.

Upon the whole, my opinion is, that the verdict is right, and that judgment ought to pass against the defendant.



YATES & MC INTIRE vs. GEORGE CURTIS.

Wherever the principal can trace his property in the hands of his factor or agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it from the agent, or in case of his failure, from his assignees.

ASSUMPSIT for money had and received. Plea, the general issue.

At the trial it appeared, that *J. B. Wood* had been employed by the plaintiffs to sell and dispose of large numbers of lottery tickets in different lotteries on their own account, he receiving a commission therefor. The accounts kept by the parties debited *Wood* with all the tickets received, and credited him with all tickets returned to the plaintiffs ; and credited them with the balance struck, deducting commissions. Some alterations were latterly made by the parties in their form of keeping the accounts for their own convenience ; but the substance of the contract between them remained unaltered. *Wood* failed in business on the 8th of May 1828, and assigned his property to the defendant for the benefit of his creditors. Considerable sums were outstanding, due from third persons for the lottery tickets so sold, at the time of the failure, some part of which had been since received by the assignee ; and for the money so received, the present suit was brought. It appeared, that on the face of some of the tickets

Wood's name was used in connexion with that of the plaintiffs, but any partnership concern was negatived by the testimony. A clerk of *Wood*, on the trial stated, that all the tickets received from the plaintiffs, and all the sums now outstanding on the sales thereof, were perfectly capable of designation and separation from the other property of *Wood*.

Upon this evidence coming out, the counsel for the parties submitted the question to the Court, whether the plaintiffs were entitled to recover. If they were, then a verdict was to be taken for the plaintiffs, for a nominal sum, and the verdict was to be enlarged and altered, as the accounts, hereafter stated, should show that the plaintiffs were entitled to recover.

Whipple for the plaintiffs, *Searle* for the defendant.

STORY J. Upon the facts, there does not seem any room for controversy. The case of *Thompson vs. Perkins*, (3 *Mason R.* 232,) following *Scott vs. Sarman*, (*Willes R.* 400,) settles the principle of law, that where a party can trace his property in the hands of his agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it. Here, it is capable of designation ; and the outstanding dues on the sale of the lottery tickets belong to the plaintiffs, and the sums received by the defendant since the insolvency of *Wood*, are the property of the plaintiffs, and recoverable by them.

Verdict for plaintiffs according to agreement of the parties.

UNITED STATES *vs.* JOHN WARDWELL AND OTHERS.

The act of 1817, ch. 197, respecting the bonds of persons in the navy, having required, that every person then in service &c. shall, instead of the bond required by a former act, enter into a new bond with sureties, conditioned for the faithful performance of his duties &c., the sureties on the old bond are discharged from all responsibility for monies received by any person &c., after he has given the new bond, the latter being, by the act, a substitute for the former.

In case of payments by a debtor to a creditor, the debtor has a right to direct the application of them, and if he does not, the creditor may apply them as he pleases.

In cases of payments to the treasury department, the officers of that department have not a right to make any application of such payments against the will of the debtor, or of his administrator.

In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and *pro rata* towards the extinguishment of all the debts due to the creditor.

The *United States* having a priority by law in such cases, does not change the rule. The duty of the administrator is the same.

In cases of running accounts, where debits and credits are made at different times, the payments are to be deemed as made towards items antecedently due, in the order of time in which they stand in the account.

The case of the *United States* furnishes no exception to this rule in cases of running accounts. All payments are deemed to be made on general account.

THIS was a bill in equity brought under the following circumstances. *Benjamin F. Bourne*, on the 14th of April 1814, was appointed a purser in the navy of the *United States*, and gave a bond to the *United States*, with *Abel Jones* and *Stephen Price*, as sureties, in the penalty of \$10,000, for the faithful performance of the duties of his office, in the usual form. On the 30th of April 1817, *Bourne* gave another bond to the *United States*, with *Stephen Price*, *C. A. Dale*, and *George Johnson*, as sureties, in the penalty of \$25,000 for the like purpose, pursuant to the act of Congress, of the 1st of March 1817, ch. 24, [197.] *Bourne* continued in office until his death, on the 10th of November 1823. During this period, large sums of money were advanced to him as purser, to be expended for the use of the *United States*. On the 5th of October 1826, the accounts of *Bourne*, for receipts and disbursements, were adjusted at the treasury department. The balance found due to the *United*

States on the 30th of April 1817, was \$7560.86; and a further balance was found due up to the 10th of November 1823, of \$31,556.88; in the whole amounting to \$39,117.74. On the 14th of November 1823, *John Howe*, one of the defendants, was appointed administrator on *Bourne's* estate; and on the 22d of September 1826, he paid to the district attorney, for the use of the *United States*, on account of money due to the *United States*, from the estate, the sum of \$4968.42. *Howe*, at the time of payment, claimed the right to apply the same in part payment of the said balance of \$7560.86, and the district attorney claimed for the *United States* the right to apply the same in part payment of either of the balances aforesaid, at the election of the proper officers of the treasury department; and it was agreed between them, that the payment should be made, without prejudice to the right of either party to apply the same to either of the balances aforesaid, at their election. The money so paid, had been in fact applied by the officers of the treasury, in part payment of the said balance of \$31,556.88. No farther monies have been paid by the administrator of *Bourne*, for want of assets.

The bill, after stating the preceding facts, alleges, that *Price* is without the jurisdiction of the Court, that *Dale* and *Johnson* are insolvent; that *Abel Jones* died in September 1815, leaving a large real and personal estate; that *Julia B. Jones*, his widow, *John Wardwell*, and the said *Howe* are administrators upon his estate, (and are made defendants to the bill,) and have possessed themselves of personal estate to a large amount, to wit, \$21,255.19; that *Julia S. Jones* (also a defendant) is the daughter and sole heir at law of *Abel Jones*, and has by descent from her father real estate to the value of \$30,000, which ought to be applied to the payment of the debts so due to the *United States*. The bill, therefore, prays for discovery and relief in the premises.

The administrators of *Jones*, in their answer, deny knowledge of the particular balances due from *Bourne* to the *United*

States ; and admit the receipt of assets of *Jones*, to the amount of \$27,778.25, and payment of the same in the course of administration. They assert that on the 18th of December 1817, *Bourne's* accounts were settled at the treasury, and that a balance of \$8697.48, found due from him to the *United States*, was charged in a new account against him, to be expended by him for the use of the *United States* ; and that it was so expended. They insist, that the act of Congress of 1st March 1817, from the time of the execution of the second bond, had the effect of superceding and annulling the first bond ; that not knowing of any balance due to the *United States*, they, on the 1st of May 1817, settled their administration account on *Jones's* estate, in the probate office, and paid the balance in their hands to the widow of *Jones*, who was also guardian of his daughter *Julia*. They allege, that no suit was commenced against them, as administrators, by the *United States*, within three years after their appointment, and rely on the statute of limitations of *Rhode Island* as a bar to the suit.

Howe, as administrator of *Bourne*, denies any farther assets ; and asserts, that the payment to the district attorney was without prejudice to his right to make application thereof, so far as he was entitled by law to do, denying that he ever assented to, or authorized the application so made by the treasury department, and insisting on his right to apply the same towards the discharge of the first bond. He also asserts the utter insolvency of *Bourne's* estate. The defendants farther allege, that *Bourne*, in his lifetime, after the adjustment of his accounts, on the 18th of December 1817, paid for the *United States* large sums of money, greatly exceeding the sum of \$8667 48, in payment of the same balance found due to the *United States* ; which sums the *United States* ought to apply to the discharge of the same. They farther allege, that the estate of *Jones* is not responsible by reason of the neglect of the officers of the government to settle *Bourne's* accounts, and to give due notice thereof to *Jones*, and by their giving him new credits &c.

The usual replication was filed ; and the cause being set down, was argued by *R. W. Greene* for the *United States*, and by *Howe* and *Searle* for the defendants.

STORY J. There is no controversy as to the facts in this case ; and the whole resolves itself into mere questions of law. I pass over all the grounds insisted upon by way of laches on the part of the officers of the government, for the decisions of the Supreme Court have fully settled them.

The first ground insisted on by way of defence is, that the act of 1817, ch. 197, is a complete discharge of the first bond as to all sums received after the second bond was executed. The statute provides, " that every person now in service, or who may hereafter be appointed, shall, *instead of the bond required by the act*, to which this is a supplement, enter into a bond with two or more sufficient sureties, in the penalty of \$25,000 conditioned for the faithful discharge of all his duties as purser in the navy of the *United States*, which sureties shall be approved," &c. My opinion is, that the argument is well founded. The new bond is to be given *instead of*, that is, in the place or room of, the old bond, and not in addition to the latter. It is a complete substitute for, and not a supplementary security to, the former. To construe the act otherwise, would be a plain departure from the meaning of the terms, and, as I think, also from its true object and intent. From the time the second bond was given, I am therefore of opinion, that the first bond was *functus officio*, as to future responsibilities for future advances.

Then as to the payment made to the district attorney by the administrator of *Bourne*. Generally speaking, the debtor has a right to make the application of payments, as he chooses ; if he omits so to do, the creditor, having different debts, may make the application to which he pleases. If neither party makes any application, the law will adjust it by its own notions of the equity and justice of the particular case. It is plain, that the officers of

the treasury department had no power to make an absolute application of the present payment by the administrator, to the liquidation of the last balance, unless the law justifies it upon general principles. If either party had a right to direct the application, it was the administrator of *Bourne*; and if applied according to his direction, it goes to the reduction of the first balance.

But I doubt, exceedingly, whether an administrator is subrogated in this respect to all the rights, which the debtor himself would have, if living. Especially do I doubt it, in case the estate is insolvent. When a debtor here dies insolvent, all his estate is distributable among his creditors, *pro ratâ*, with the exception of certain privileged creditors having priorities, such as the *United States*, the State, and creditors for charges of the last sickness, and of the funeral of the party. In such cases of administration, it seems to me, that all the demands of each creditor form one consolidated debt, and that the payments made, are to be *pro ratâ* upon the whole, to be applied in the same way towards the discharge of the whole. The administrator has no right, at the instance, or for the benefit, of third persons, to direct the payment to be applied on account of any particular debt. He is bound to pay, on all debts, a *pro ratâ* sum. If this be so as to ordinary creditors, the circumstance, that the *United States* have a priority, does not change the duty imposed by law; for if the assets are not sufficient to pay all the debts due to the *United States*, the same reason applies, that is, that the payment shall be *pro ratâ* on all. The administrator acts, not for himself, nor for sureties, nor upon personal preferences, but as a trustee for the benefit of all the creditors *pari passu*. And I think the law requires him in the execution of the trust, to distribute the burthen and the benefits equally among all the creditors, without preferences, and without prejudice to the rights of any sureties. Upon these principles, my opinion is, that the sum paid by the administrator ought to be applied, as of right, to both balances, discharging each *pro ratâ*, in the proportion which the respective amounts

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bear to the whole sum paid. *Perris vs. Roberts*, (1 *Vern. R.* 34,) proceeded on principles which afford a just analogy.

But another ground of defence supercedes, or rather, renders the former unimportant. It appears, that the accounts of the treasury have run on, from time to time, ever since his first appointment, charging him with advances made, and crediting him with disbursements. Balances have been struck from time to time; and the balances have been again carried forward to the debit side of the new accounts. It is, therefore, the common case of a running account, where there are various debits and credits on each side, and the question is, in such a posture of things, where there has been no specific application made of any payments, by either party, to any specific items, how the payments thus passed into general account are to be deemed, in point of law, to have been applied. My opinion is, that they are to be considered as applied in discharge of the items antecedently due, in the order of time in which they stand in the account.

This is the natural, and, as I think, the legal result of carrying the credits into general account. The doctrine of *Clayton's case*, (1 *Merivale R.* 572, 604, 608,) is directly in point, and stands upon irresistible reasoning. It is confirmed, if confirmation were necessary, by *Bodenham vs. Purchas*, (2 *Barn. & Ald.* 39,) *Simson vs. Cooke*, (1 *Bing. R.* 452,) and *Simson vs. Ingham*, (2 *Barn. & Cresw.* 65.) The case of *United States vs. January & Patterson*, (7 *Cranch*, 572,) has been supposed to justify a different doctrine. It appears to me, that such is not the true explanation of that case.* It turned wholly upon its

**Note by Judge Story.*

UNITED STATES vs. JANUARY & PATTERSON.

[Supreme Court of the United States, February Term 1818.]

This case, as reported in 7 *Cranch*, 572, is inaccurately given, as to the facts apparent on the record; and I therefore transcribe them from

own particular circumstances, and the charge of the Circuit Court, which, with reference to the facts, the Supreme Court thought erroneous. The questions then were, (1.) whether the

the bill of exceptions, upon which alone the opinion of the Supreme Court proceeded.

It was an action on a bond of the 25th of August 1797, and the pleadings were, as stated in 7 *Cranch*. The suit was commenced on the 20th of November 1804.

At the trial, the attorney for the *United States* gave in evidence an account of the *United States* against *Arthur*, taken from the books in the supervisor's office, containing the debits and credits of *Arthur*. The debits, beginning on the 30th of September 1797, and extending to the 30th of June 1802, amounted to \$30,584.99½. The credits, beginning on the 30th of June 1798, and ending on 30th of June 1802, amounted to \$14,403.84, leaving a balance due to the *United States* of \$16,181.15½. There was a deduction afterwards made of an erroneous allowance of commissions, of \$970.86; and subsequent allowances of credits received between March 1804 and July 1805, of \$573.77½. So that the ultimate balance, stated as due to the *United States* on that account, was \$16,578.23½.

There was also given in evidence, a separate account drawn off from the supervisor's books, containing the debits and credits of *Arthur* from the time of his appointment, until he executed a second bond to the *United States* with *Patterson* alone, as his security, [on the 23d of March 1799, which was sued, and is the case reported in 7 *Cranch*, 575.] This account presented on the debit side \$9034.13½, and after deducting the credits, \$2554.23, left a balance due to the *United States*, of \$6479.90½.

The second bond aforesaid was also read in evidence, and also an account drawn off by the supervisor from his general account, as the debits and credits against the said *Arthur*, after the date of the said bond. In this account the debits up to the 15th of November 1803 were \$21,550.86, and the balance due, after deducting the credits, was \$9701.24.

The defendants then offered in evidence, the deposition of *James Hughes*, taken on the 11th of May 1811, which was objected to as improper evidence, but the objection was overruled by the Court. It was

supervisor had any right to make a special application of any prior payments, made on general account, and if he had, then, (2.) whether the promise of the supervisor to make a particular

as follows. "This deponent says, he did, as attorney for *Thomas January*, apply to Major *Morrison*, supervisor in *Lexington*, at his office, *some years ago*, *the precise time he cannot now recollect*, but he is confident it must have been before the judgment entered in the *Kentucky District Court*, in the suit, the *United States* against *Arthur & Patterson*, [i. e. on the second bond,] in order to obtain information from the said *Morrison* respecting the said *January's* responsibility and danger of being made liable, as a security in a bond for *John Arthur* as collector of excise, bearing date, as appears from the bond, the 25th day of August 1797. This deponent believes he was requested by *January* to bring a suit against the said *Morrison* to compel him either to give up the bond, or give the said *January* a receipt or discharge against it; and that this deponent wished to understand from the said *Morrison*, what was the said *January's* situation before he took any such measure, or whether such measure was necessary. The said *Morrison* informed the deponent, that *John Arthur* had paid a sufficient sum to discharge that bond; and that what he had paid *should be so applied*. This answer was reported to the said *January*, with which he appeared satisfied; and this deponent was himself of opinion he was safe." Signed *J. Hughes*.

The objections stated to the admission of the deposition on the record were, (1.) because the said deposition did not go to prove, that the said *Arthur* had discharged the condition of the bond in suit; (2.) because it only went to prove a promise on the part of the supervisor to appropriate the payments, and not an *actual appropriation*; (3.) because it did not appear, that *Arthur* had given any directions to the supervisor, *how to apply his payments*, or that the supervisor had ever made his election to appropriate them differently from the account current; (4.) because the said *Arthur & Patterson* were not present and assenting to the arrangement promised to be made by the supervisor; (5.) because it was an attempt by bare parol to impeach the words [accounts?] of the supervisor; (6) because the words [accounts?] of the supervisor were the best and only evidence of the application made by the supervisor, and ought not to be impeached or contradicted by a

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application of the payments, after they had been passed into general account, was, *per se*, an application of such payments, unless followed by some positive act of appropriation. The Supreme

promise of the supervisor to do an act out of the line of his duty, and contrary thereto. But the Court overruled the objections, and the deposition was permitted to go to the jury as evidence, for the purpose of showing that the bond was paid and discharged.

The attorney for the *United States* then introduced *Morrison* (the supervisor) as a witness, who deposed, "that he had a recollection of *James Hughes*, calling upon him as the attorney of *January*, and conversing with him about the bond now sued upon. But that he did not believe, that he had ever told said *Hughes*, that he would appropriate the payments to the discharge of the bonds upon which the suit is brought. That the payments, which had been made by *Arthur*, if applied to the bond now sued upon, would discharge it; but that he had never made any other appropriation, as he recollected, than that stated in the accounts above alluded to; although he might have said, and he believed he had frequently told the defendant, *January*, and others, that the whole of *January's* bond would be paid off, if the payments that were made by *Arthur* were appropriated to the discharge of that bond exclusively; and that he had himself entertained an opinion, that the payments that were made by *Arthur*, ought to be applied to the payment of the first bond, until that was paid off. But that he had determined to enter the credits as they were made upon the account current, which he had done, and leave it to the law and the Court to fix appropriations, when difficulties should arise. That *Arthur* never gave him any directions about the appropriation of his credits at the time, or before, he became entitled to them, nor until after a suit was brought against him and *Patterson* upon the last [second] bond; and that then he gave him directions in writing to appropriate certain credits and payments exclusively to the credit of *Patterson*; but that he refused to do so, leaving it to the Court to make the appropriation."

The defendants then called one "*James Coleman*, formerly a clerk in the supervisor's office, who deposed, that the defendant, *January*, several times called at the office on the subject of his bond, expressed his uneasiness about its remaining out, and his desire to get it up. That the supervisor assured him, that *Arthur* had paid enough to discharge that

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Court decided both points against the defendant ; and overruled the contrary decision of the Circuit Court. The case of the *United States vs. Nicoll*, (12 *Wheaton*, 505,) in which the *United*

bond, and that he might make himself easy ; but refused to give up the bond, because he thought such bonds ought to remain as vouchers in his office."

The record then proceeds:—"This being the *whole of the testimony delivered on both sides*, the attorney for the *United States* moved the Court to instruct the jury, *that the election and promise of the supervisor to James Hughes, stated in his deposition, unless the said promise was fulfilled by some act of appropriation of the payments, by the supervisor, was not of itself an appropriation of the payments.* But the Court overruled the motion of the attorney, and, on motion of the defendants, instructed the jury, that if they believed that the supervisor had made the election and promise, *as stated in the deposition of James Hughes*, that it was a declaration of his election, how the payments made by *Arthur* should be applied ; and that whether a formal entry in the books, of their appropriation, corresponding with that election, were made or not, was immaterial, and *that the jury ought to consider the appropriation as made.*" To which opinion an exception was taken.

Such is the record ; and upon this posture of the case several observations arise to explain the opinion of the Court.

1. The cause was submitted *without argument* ; and therefore no points could arise before the Court, except such as were apparent on the record.

2. Now upon the record the only points were, (1.) the admissibility of *Hughes's* deposition ; and (2.) the instruction of the Court with reference to *that deposition*.

3. No point was made as to the effect of payments and credits made on *general account* in an account current between the parties. But the whole cause seems to have proceeded upon the assumption, that but for the special election and promise of the supervisor, the payments made and credited upon general account would not have extinguished the antecedent items of debt, so as to have discharged the first bond on which *January* was surety. The point not having been made, could not intentionally have been decided by the Supreme Court.

4. There was no evidence, that in the slightest degree tended to

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States vs. January & Patterson is recognized, turned upon entirely distinct considerations. There the *United States* were supposed to have a right, like any other creditor, to apply pay-

show, that *Arthur*, at or before the time *when the payments or credits were made by the supervisor in his books*, directed any special appropriation of them; or that he did not intend that they should be placed to *general* account. On the contrary, *Morrison* expressly swore, that no such directions had ever been given until *long afterwards*, and after the suit was brought on the first bond. And *Hughes's testimony*, which applies to a period *long after all the payments were made*, and passed in the account current on *general* account, only goes to show, that the supervisor *at that time* elected and promised, that the payments and credits *should* be applied to the discharge of the antecedent debt; *not* that he *had already so applied them*. But the point did arise, whether, when no special appropriation had been made by either party at the time of the payments, but they had been passed to *general* account, without objection, on the account current, a public officer could, by his subsequent election or promise, change or alter the appropriation from the *general* account already made, to a special account. Some of the objections taken to the admissibility of *Hughes's* deposition relate to this point.

If the opinion of the Court is examined with reference to the facts above stated, and the points made on the record, it will at once be seen, that there was no decision made on the point often supposed to have been ruled in this case, *viz.* that payments made on *general* account do not, (as in common cases,) go to extinguish antecedent items of debt according to the order of time, when the account is with a public officer of the *United States*.

The judge, who delivered the opinion of the Court, after referring to the rule of law, that the debtor may, if he pleases, at the time direct the application of payments, and if he does not, the creditor may direct it; and if neither does, the law will make the application, proceeded to state, that the majority of the Court were of opinion, "that the rule adopted in ordinary cases is *not applicable to a case circumstanced as this is*, where the receiver is a public officer not interested in the event of the suit, and who receives on account of the *United States*, where the payments are indiscriminately made, and where sureties under distinct obligations are interested."

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ments, made by the debtor, to any account, where the debtor himself had made no application.

I have had occasion to consider this point in the case of the

If I understand this declaration correctly, it must, with reference to the facts in the case, mean, that where payments have been *indiscriminately* made, and carried to *general* account with officers of the *United States*, the debtor has no right *subsequently* to direct or alter, the appropriation so made, to any other account or purpose. Neither has the officer acting for the *United States* a right to assent to or to make such subsequent appropriation. He has no authority to change, on behalf of the *United States*, the state of any payment as it is first applied on *general* account.

It is then added : "It will be *generally* admitted, that moneys arising due and collected, subsequently to the execution of the second bond, cannot be applied to the first bond, without manifest injury to the surety on the second bond, and *vice versa*. I understand this to be no more than an argument from inconvenience ; and not an assertion, that all moneys collected subsequently to the second bond are, if passed to *general* account, to be applied, not to the discharge of the *first*, but of the *second* bond.

It is then added : "Justice between the different sureties can only be done by reference to the collector's books ; and the evidence, which they contain may be supported by parol testimony, if any in possession of the parties interested."

I understand from this declaration, that the books of the collector are to furnish the evidence as to the debits and credits, whether on *general* account, or on *special* account or appropriation ; and that parol evidence is admissible to *support* that evidence ; but not to *contradict* it. At least the latter position, if not stated nor implied, is not disaffirmed.

The decision was, "that the Circuit Court erred in the *opinion given*." That is, that the Circuit Court erred in instructing the jury, that if they believed, that the supervisor had made the election and promise, *as stated in Hughes's deposition*, it was a declaration of his election, how the payments of *Arthur* should be applied, and that whether a formal entry was accordingly made of such appropriation or not, in his books, the jury ought to consider such appropriation as made.

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Postmaster General vs. Furber, (Maine,) 1827, and to the opinion there given I deliberately adhere.

My judgment is, that, as the credits carried into the general account of *Bourne*, for disbursements since the second bond was given, far exceed those due by him to the *United States*, the parties to the first bond are discharged from any responsibility thereon. The bill must therefore be dismissed.

Bill dismissed accordingly.

Now this opinion of the Circuit Court embraces two points: 1. That the supervisor had a right *after such payments upon general account*, to make a special application of them to the first bond: 2. That his promise to *Hughes* was an election to make such special application, and amounted without any farther act done to an actual application according to his promise.

The decision of the supreme Court negatives both propositions, *and goes no farther*. The language of the judge must be construed with reference to them.

There is no record of the form of the judgment of reversal, or mandate in this case.

In *United States vs. Nicoll*, (12 *Wheaton R.* 505, 511,) this case of *United States vs. January & Patterson*, (7 *Cranch*, 572,) was referred to by the Court in its opinion, as in point to show, that as to credits after a second bond given, it was *at the election of the government* to apply them to either account. This is doubtless true, where the debtor makes no other application at the time of the payments or credits. But if the government carry them to *general account*, it is presumed, that it was not intended to say, that they could afterwards be altered to a special account, by the government, so as to affect sureties.

 Pratt et al. vs. Northam et al.

THOMAS PRATT and ANN F. his Wife, and ROBERT J. AMBROSE,
Plaintiffs,

vs.

STEPHEN T. NORTHAM and SARAH LANGLEY, Executors of
William Langley, and **NICHOLAS TAYLOR AND OTHERS,**
Judges of the Court of Probate for the town of Newport in
Rhode Island, **Defendants.**

The courts of the *United States*, as courts of equity, possess jurisdiction to maintain suits in favour of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favour of the party. This class of cases is of concurrent and not of exclusive jurisdiction.

A judgment in the court of probate of a state, is not conclusive, where it has been obtained by fraud. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive.

A bill for a discovery of assets lies in equity, notwithstanding a remedy at law.

If an *American* administrator procure an auxiliary administration in *England*, and receives from the administrator there, the assets collected under such administration, he is chargeable here for the assets so received as administrator.

If an administrator be at the same time guardian of the legatees or distributees, and receive foreign assets as abovesaid, and do not inventory or account for them, or procure any settlement of them in the Probate Court, and a distribution of them according to law, he will be deemed to receive them as *administrator*, and not to retain them as *guardian*. Some act or admission, showing a retainer as guardian, as an accounting in the probate office as guardian for the same, is necessary to exonerate him from liability as administrator.

The sureties of an administrator are liable, in the same manner as their principal, for assets so received, until some act or admission establishing a retainer as guardian. *A fortiori* the rule is so, where the administrator has never admitted the receipt of such assets as guardian or administrator; but fraudulently concealed the fact from all the parties in interest.

The statute of limitations binds courts of equity as well as law, in cases of concurrent jurisdiction; and sometimes, by way of analogy, binds equitable titles.

The statute of limitations of *Rhode Island*, of suits brought against executors and administrators, is a good bar in equity as well as at law.

Where an administrator and his sureties die, a suit brought by a legatee or distributee to recover for the default of the original executor in not paying the same, must be brought against the administrator of the executor, or the executor of his sureties, within three years after the last administration is taken out; otherwise it is barred.

Who are proper parties to be made in such a case?

BILL in equity. The facts of the case were as follows:

Adam Ferguson of *Newport, Rhode Island*, made his will,

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bearing date April 12, 1797, giving all his property, real and personal, to his only child, *Isabella Ambrose*, and appointing her executrix to his will. Some time in July 1800, said *A. Ferguson* died, (his daughter *Isabella* having died before him,) leaving his will unrevoked. By the laws of *Rhode Island*, (*Digest of 1798, p. 282,*) when any devisee of personal or real estate dies before the testator, leaving lineal descendants, such descendants shall take under the will in the same manner as the devisee would have done, had he or she survived the testator. *Isabella Ambrose* left two children, *Ann F. Pratt*, and *Robert J. Ambrose*, plaintiffs in the present bill. On the 14th of July 1800, the will of *A. Ferguson* was approved by the court of probate of the town of *Newport*. On the 21st of the same July, *Robert M. Ambrose*, the husband of the said *Isabella*, and the father of the said *Ann F.* and *Robert J.*, was appointed administrator on the estate of *A. Ferguson*, with the will annexed, and gave bond according to law, with *William Langley* and *Israel Ambrose* as sureties. On the 4th of August 1800, an inventory of the personal estate of the said *A. Ferguson* was returned to the court of probate, amounting to \$311.60. On the 9th of May 1808, *R. M. Ambrose* rendered his account of administration, bearing date April 25th, 1801, which was received, examined, and allowed by the court of probate. The bill charges, that the decree of the court of probate allowing this account was obtained by fraud. This account credits the estate of *A. Ferguson* with the amount of the inventory, being \$311.60, and exhibits a balance in favour of the administrator against the estate, of \$636.83. This is all the inventory or account of the property of *A. Ferguson*, ever rendered by the said *R. M. Ambrose*.

A. Ferguson, at the time of his death, had a balance of account due him from the firm of *Mitchell & Cockburn*, who were established, and transacting business, in the city of *London*.

This firm was composed of *George Hanbury Mitchell* and *James Cockburn*, was formed in January 1800, and was dissolved in September 1802, by the death of *Cockburn*. Upon the death of *Cockburn*, *Mitchell* continued the business of the firm, under a new firm, composed of himself and others, under the style of *Mitchell, Lindsey, & Co.* and the balance due *A. Ferguson* from *Mitchell* and *Cockburn* was transferred to the firm of *Mitchell, Lindsay, & Co.*

A. Ferguson, at the time of his death, also owned stock in the *English* funds, which stood in the name of *William Innes*, merchant, of the city of *London*. Said *Innes* died before *A. Ferguson*, and *George Hanbury Mitchell*, *James Innes*, and *John Nicholl*, were the executors of his will. On the 26th of June 1801, *R. M. Ambrose* wrote *Innes* and *Mitchell*, executors, stating the decease of *A. Ferguson*, that he was administrator on his estate, with the will annexed &c., and requesting information of the balance due, and the amount of the stock &c. To this letter, *Mitchell & Cockburn* reply, under date of September 3, 1801, in which they state the amount of the balance in their hands, also the value of the stock, and advise, that *R. M. Ambrose* should send out a power to some one in *England* to take letters of administration; that such person being appointed administrator on the effects in *England*, would be authorized to receive the balance, and the proceeds of the stock or the stock itself, and to pay it over to him *R. M. Ambrose*. On the 21st of December of the same year, *R. M. Ambrose* sent out a joint and several power to *Mitchell & Cockburn* to take out letters of administration for him in *England*, and requested, that the executors of *William Innes* would transfer the stock to the names of *Mitchell & Cockburn*, which was accordingly done by the two surviving executors, *George Hanbury Mitchell* and *John Nicholl*.

Mitchell & Cockburn supposed, that *Isabella Ambrose* had died after her father. Under this impression, letters of administration, bearing date February 27, 1802, were granted to *James*

Cockburn, one of the firm of *Mitchell & Cockburn*, on the property of *A. Ferguson*, with the will annexed, and on the property of *Isabella Ambrose*, all for the use of *R. M. Ambrose*. On the 23d of February, 1803, this stock was sold by *Mitchell* for £ 374. 4s. 3d. (*Cockburn* having died September 1802 ;) and this sum was placed to the credit of *R. M. Ambrose* in the hands of *Mitchell, Lindsay, & Co.* by him the said *Mitchell*. The balance due from *Mitchell & Cockburn*, and transferred to *Mitchell, Lindsay, & Co.* as before stated, together with the proceeds of the stock, amounted to the sum of £644. 12s. 8d. and was drawn for by *R. M. Ambrose* by bills of exchange, from January 28, 1803, to October 16, 1804. The balance which was transferred from *Mitchell & Cockburn*, to *Mitchell, Lindsay, & Co.* was increased in the hands of the latter, by the receipt of the dividends on the stock, until the same was sold. The transfer of said balance to *Mitchell, Lindsay, & Co.* ; the transfer of said stock to *Mitchell & Cockburn*, by the executors of *William Lanes* ; and the subsequent sale of the same by *Mitchell* ; were all done by the direction and at the request of *R. M. Ambrose*.

R. M. Ambrose, on the 6th of April 1801, was appointed guardian of the said *Ann F. Pratt* and *Robert J. Ambrose*, and gave bond in the penal sum of \$4000 for the faithful performance of the trust, but never rendered any guardianship account whatever, and the sureties on this bond are both dead and left no estate. *R. M. Ambrose* is dead, leaving no property, and no administration has ever been taken on his estate ; *Israel Ambrose*, one of the sureties on his administration bond, is also dead, leaving no property, and no administration has ever been taken on his estate, neither of them leaving any estate to administer upon. Some time in 1817, *William Langley*, the other surety on the administration bond of *R. M. Ambrose*, died, leaving a large real and personal estate, which he disposed of by will. *Stephen T. Northam* and *Sarah Langley*, defendants in this suit, are his executors. The will was approved July 9, 1817, the executors ac-

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ed of the trust, and gave bond according to law. The will has the following provisions: "The whole of my bank shall be kept sacredly for the purposes expressed in this last will and testament, and to that end, if my personal estate over and above said bank stock last mentioned, should be insufficient for the payment of my just debts and the expenses of settling my estate in manner provided by law, and for the raising and disposition of said sum of \$3000 as herein above ordained, then my will is, and I hereby authorize and order my said executors, to make sale of so much of my real estate, at their discretion, as may be necessary to make up the deficiency, and the proceeds thereof to apply for the purpose of making up said deficiency; and to execute and deliver all necessary deeds and grants of the said real estate, so to be sold by them as aforesaid. Provided, however, that if it should be necessary to make sale of any of my real estate for the purposes aforesaid, that part thereof now occupied by my said daughter *Sarah R. Ambrose* and her husband shall not be sold, excepting, that the other parts of my real estate should prove deficient for the purposes aforesaid."

The *Sarah R. Ambrose* herein mentioned, was the second wife of said *R. M. Ambrose*, and the daughter of the said *William Langley*. The executors possessed themselves of ample personal estate, exclusive of the bank stock, to pay all the debts of the testator, including the debt due the plaintiffs, and expenses of settling the estate. The said *Ann F. Pratt* became of age in March 1818; the said *Robert J. Ambrose*, November 1820; and no evidence or information of the property in *England* belonging to *Adam Ferguson*, and received by *R. M. Ambrose*, ever could be obtained by the plaintiffs, until October 1825, although much expense had been incurred for that purpose, and a commission had been sent to Mr. *Aspinwall*, to take the testimony, in 1817, to be used in a suit in the State Court, who returned, that after

making the most diligent inquiry, he could discover no traces of the property.

The bill charged, that all the debts of *William Langley*, except the debt due the plaintiffs, were paid, and prayed for an account of the personal estate of *William Langley*, and that if the same, exclusive of the bank stock and legacy of \$3000, was sufficient to pay the plaintiffs, that the executors might be decreed to pay accordingly ; or in case of a deficiency of personal estate, that the executors might be decreed to sell enough of the real estate to make up the deficiency ; and for general relief.

The case was argued at great length by *Pearce* and *Greene* (District Attorney) for the plaintiffs, and by *Hunter* and *Hazard* for the defendants.

STORY J. This is a bill in equity, brought under the following circumstances. The plaintiffs, *Ann F. Pratt*, (wife of the plaintiff, *Thomas Pratt*,) and *Robert J. Ambrose*, are children of *Isabella Ambrose* deceased, and her only lineal descendants. In April 1797, her father, *Adam Ferguson*, made his will, and after payment of his debts &c. he devised and bequeathed all his real and personal estate to the said *Isabella*, and made her executrix of his will. She died before her father, leaving her children above named. Her father then died, viz. in 1800, and in July of the same year, *Robert M. Ambrose*, the husband of *Isabella*, and father of her children, took administration with the will annexed of *Ferguson's* estate, and gave a bond to the court of probate in the usual form, for a faithful administration of the estate. The sureties upon the probate bond were *Israel Ambrose* and *William Langley*, both of whom are since deceased. *Langley* made his will, and appointed the defendants, *S. T. Northam* and *Sarah Langley*, his executors, who took upon themselves the trust. The other defendants named in the bill, are the present judges of the probate court of *Newport*, who, as successors in office of the former judges, are regularly entitled to the custody and con-

troul of the bond, and to institute proceedings thereon, for the due settlement of the estate. The reason assigned in the bill for making them parties is, that they have confederated and combined with the other defendants, to deprive the plaintiffs of the benefit of the bond, and have refused to deliver the same, or an authenticated copy thereof, to the plaintiffs, though often requested and urged so to do. No proceedings seem however to have been had against them, and no decree is now sought against them.

By the laws of *Rhode Island*, "when any child, grandchild, or other relation, having a devise or bequest of real or personal estate, shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way and manner such devisee would have done, in case he [or she] had survived the testator." (*Digest of 1798*, p. 282, § 6.) Consequently the children of *Isabella* are entitled to take the same as their mother would have done. The bill charges, that *Robert M. Ambrose*, after so taking administration, received sundry sums of money belonging to the estate, and particularly some money due to *Ferguson* in *England*, where he caused an auxiliary administration to be taken out, under which the money was received for, and by, him. It farther charges, that he never brought into account, or in any proper manner administered upon, the assets so received, but fraudulently concealed the receipt of the same from the court of probate; that in May 1808, he settled an account of his administration in the probate court, without giving any credit for such assets, and there charged a balance due to himself of \$636.83, which account was duly allowed and ordered to be recorded. It farther charges, that the decree of allowance was procured by fraud. It then proceeds to state, that *Israel Ambrose*, the surety, died intestate, leaving no estate, and that no administration has been granted on his estate. That *R. M. Ambrose*, (the administrator,) in September 1815, died intestate, leaving no estate, and that no

administration has been granted on his estate. That in June 1815, *William Langley* (the other surety) died, leaving a large estate, having first made his will, and that *F. T. Northam* and *Sarah Langley* are his executors, and have possessed themselves of a large estate, more than sufficient to pay all his debts, and to pay the plaintiffs, &c. And the bill insists on the right of the plaintiffs to receive payment, from *Langley's* estate, of the sums due them, in virtue of the bequest to their mother by *Adam Ferguson*. And a discovery is prayed for, and a decree of payment, out of the personal assets, of the sums due them as aforesaid, and that if they are insufficient, out of the real estate of *Langley*, which by his will is specially charged with payment of his debts: There is also a general prayer for relief.

Many of the facts, stated in the will, are admitted by the answer of *Northam* and *Langley*, executors; and indeed the other facts put in issue, seem substantiated, far enough to lay a ground work for relief, if the plaintiffs are otherwise entitled to any, upon a survey of the whole merits, and according to the principles of a court of equity. But a very important fact disclosed in their answer is, that in April, 1801, *Robert M. Ambrose*, the administrator, took out of the probate court letters of guardianship upon the persons and estates of his children, the plaintiffs, who were then minors, and did not come of age until after his death. He gave bonds in due form of law, in the penalty of \$4000 with sureties, for the faithful performance of his duties as guardian. The bond, by the laws of *Rhode Island*, like that in cases of administration, is taken in the names of the judges of probate, for the time being, payable to them and their successors in office. The sureties on the guardianship bond are both dead; one of them leaving his estate insolvent; and the other leaving an estate inventoried at \$1082.90, of which no administration account has yet been settled. No guardianship account was ever rendered by *R. M. Ambrose*, the guardian, to the probate court; and the minors came of age in 1818 and 1820. Upon the set-

tlement of the administration account of *R. M. Ambrose* in 1808, a quietus in common form was granted to him by the court of probate.

The answer of the executors sets up several matters of special defence, which I shall by and by consider in the progress of the present judgment.

Upon this posture of the case, presenting somewhat of novelty in its outlines, several questions have been argued at the bar, upon which, perhaps, it might not be necessary to pass an ultimate judgment, if it were not of some importance to close this unpleasant controversy. I will proceed, therefore, in the first instance, to consider the objections insisted on by the defendants' counsel, reserving the consideration of some others, until they shall have been first disposed of.

The first objection taken, is to the jurisdiction of this Court, as a Court of equity, to entertain the suit, for two reasons. The first is, that the plaintiffs have, if entitled to any, a complete remedy at law, upon the administration bond, according to the laws of *Rhode Island*. The second is, that by the same laws, the decree of a quietus operates as a final and conclusive bar to any farther proceedings upon the bond.

The last reason is founded on the 25th section of the act respecting intestate estates, (*Digest of 1798, p. 304,*) which enacts, "that the settlement of the accounts of any executor, administrator, or guardian, by the court of probate, or in case of appeal, by the supreme court of probate, shall be final and conclusive on all parties concerned therein, and shall not be subject to re-examination in any way or manner whatsoever." This language cannot be considered as giving any higher or stronger efficacy to a probate decree, than a judgment possesses at the common law.

Upon general principles, fraud avoids the latter, and the same doctrine has been uniformly applied to all instruments and proceedings, however solemn. The cases of *Sims vs. Slocum*, (3 *Cranch*, 307,) and *Ammidon vs. Smith*, (1 *Wheaton R.* 447,)

admit the general principle, and turn upon distinct considerations. There is the more stringent reason for applying the doctrine in the present case, because the administrator, at the time of the settlement, united in himself also the character of guardian of the plaintiffs, and as minors, they had no means of redress except through him. To say, therefore, that his own fraud should, under such circumstances, bind them, would be to subvert the very foundations of justice. The money received by him through the instrumentality of the auxiliary administration in *England*, was clearly assets in his hands, of the testator, *Ferguson*, and ought, as such, to have been accounted for in his administration account, settled in 1808. The omission so to do was a plain departure from his duty, a breach of the condition of his probate bond, and an inexcusable fraud.

As to the other ground, it is true, that by the laws of *Rhode Island*, (*Digest of 1798*, p. 307, 308, 309, &c.) creditors, devisees, and legatees, may have remedy by a suit commenced for their use on the administration bond, in the name of the court of probate, where there is a mal-administration; and legatees also have a direct remedy at law against the administrator, for their legacies, whether they be specific, or general, or residuary legatees. In many cases, the remedy, thus provided, may be adequate and complete. In many, however, the statute provisions do not reach the whole mischief. They are not adapted to a case like the present. They presuppose, that the debt or demand of the party has been already ascertained by a judgment at law on a decree in the probate court; that proceedings for this purpose have been had while he was living; and also for the most part, that he is personally sued on the administration bond. In a case circumstanced like the present, I am by no means satisfied, that there is any plain, adequate, or complete remedy at law under the statutes of *Rhode Island*. They do not seem to contemplate such complicated and special cases.

But if it were otherwise, the conclusion to which the objection seems to arrive, would not be attained. It has been often decided by the Supreme Court, that the equity jurisdiction of the courts of the *United States* is not limited or restrained by the local remedies in the different states ; that it is the same in all the states ; and is the same, which is exercised in the land of our ancestors, from whose jurisprudence our own is derived.¹

There are many cases where there exists a concurrent jurisdiction in courts of law and equity. Such are cases of account, of fraud, of partition, of dower, &c.² The existence of such legal remedy has never been supposed to oust the jurisdiction of a court of equity. On the contrary, the jurisdiction has been constantly maintained. And *a fortiori*, where the original remedy exists in equity, as in cases of fraudulent affirmations of credit, and of legacies, the subsequent assumption of jurisdiction at law ought not to be held to oust that which has already vested. It has been for a great length of time settled, that in cases of the administration of assets, courts of equity have a concurrent jurisdiction with courts of law. The original ground seems to have been, that a creditor or other party in interest, had a right to come into chancery for a discovery of assets ; and being once rightfully there, he should not be turned over to a suit at law for final redress.³ And for the purposes of complete justice, it became necessary to conduct the whole administration and distribution of the assets under the superintendence of the court of chancery, when it once interfered to grant relief in such cases. This whole subject is investigated with great care and clearness by Mr. Chancellor Kent, in *Thompson vs. Brown*, (4 Johns. Ch. R. 619,

¹ *Robinson vs. Campbell*, 3 Wheaton R. 212.—*United States vs. Howland*, 4 Wheaton R. 108, 115.

² See *Smith vs. M'Iver*, 9 Wheaton R. 532.—*Cooper Eq. Plead.* xxviii.

³ See *Jesus College vs. Bloom*, 3 Atk. 262, 263.—*Yates vs. Hambly*, 2 Atk. R. 360, 363.

631, &c.) and his elaborate judgment spares me the necessity of any attempt farther to illustrate or confirm it. The plaintiffs, then, would be here rightfully in Court, if for no other purpose, for a discovery of assets in the hands of the executors of *Langley*. The jurisdiction too might be fortified by considerations derived from the doctrines of this Court, in *United States vs. Aborn*, (3 *Mason R.* 126.)

It has also been suggested, that the present is a bill for discovery and relief, and that as no discovery has been obtained, no relief can be granted. And the language of the Chief Justice in *Russell vs. Clarke's Executors*, (7 *Cranch*, 89,) has been relied on for this purpose. That was a case where the remedy was exclusively at law; and the discovery sought was that alone, which could give jurisdiction to a court of equity. It was, as a bill of discovery, wholly unproductive, and therefore properly dismissed. Here, the jurisdiction was not exclusively at law; and the discovery of the assets has been complete. The executors answer as to them; and only deny possession of other vouchers, papers, and documents, belonging to the estate of *Ferguson* or his administrator.

Then again it is objected, that here there is no sufficient charge or proof of fraud. Certainly there is none proved against the present defendants; they are innocent, and so was *Langley*, their testator. But there is a direct charge in the bill, that the decree of the court of probate in 1808 was obtained by the fraud of *R. M. Ambrose*, the administrator, which, as I have already intimated, is sufficiently established. And if there were no actual fraud, still if the assets have been wrongfully withheld from the representatives of the legatee, so that the administrator would be liable therefor, it would be difficult to perceive how an omission to account for them would escape from the imputation of being a breach of the administration bond. There is certainly no pretence to say, that the court of probate participated in the fraud; and if the judges of that court had so participated, and in their

Judicial character sanctioned it, I am far from asserting the least right to controul, or overreach, or review their judicial acts. But it is unnecessary to touch such a point. It would be an indecorum to that court, far removed from my habits and feelings, to discuss what might be the possible effects of their misdeeds, when there is not the slightest evidence to bring into suspicion the purity or fidelity of their judgment.

Another objection is, that the assets fraudulently suppressed were received after the administrator was appointed guardian, and therefore might properly be considered as received on guardianship account. It appears to me, that this objection is not supported either in law or fact. The administration in *England* was granted professedly at the request, and upon the authority, of the *American* administrator. It was auxiliary to the *American* administration ; and the proceeds were not only drawn for by the *American* administrator, but were received by him, as assets of his testator. It is true, that the *English* administration was granted upon the supposition, that *Isabella* survived her father ; and that her husband was entitled to the beneficial interest in the legacy as her representative. But this does not vary the legal result, for the money received was clearly assets. It is an entire mistake to suppose, that the *Rhode Island* laws⁴ in force, at this period, do not authorize the administrator there to receive any debts or property which, at the time, were not locally due or existing, within the state. Whatever property was received by him as belonging to the testator, and as part of his assets, he was bound to administer, wherever it might have been at the time of the death of the latter. The condition of the bond contains a clause, that he shall well and truly administer all the goods, chattels, rights, and credits of the testator, which at any time shall come to his hands and possession. It is one thing, whether he could, without a new administration, recover by suit any debts or

⁴ See *Digest of 1798*, p. 276, 294, 295.

property in a foreign country ; and quite another thing, when he obtains a possession of them, whether he must not account for them as assets. A voluntary payment by a debtor to a foreign administrator is a good discharge of the debt ; and the latter holds the same as assets.⁵ This can only be upon the principle, that the administrator may rightfully receive them as assets in virtue of his authority as administrator, and give a competent discharge.

What, then, was the duty of the administrator upon the receipt of these assets ? It was plainly his duty to inventory them, and account for them, as part of the testator's estate in his hands and possession ; and upon the settlement of his accounts in the probate office, he ought to have procured a decree directing a distribution of the balance between his wards, in equal moieties. Had he so done, there would have been no question, upon the principles settled by this Court in *Taylor vs. Deblois*, (4 *Mason R.* 131,) that the administration bond would have been discharged, and by operation of law he would have been deemed to possess the balance, in his character as guardian.

This leads me to the consideration of another objection of a more grave complexion. It is, that, though the property was received by *R. M. Ambrose* in his character as administrator ; yet as he was at the same time guardian of the parties entitled to the proceeds upon a decree of distribution, by the mere operation of law, and without any act done by him, it was instantaneously transferred to his account as guardian, and so all responsibility under the administration bond is extinguished. If any act had been done by *R. M. Ambrose*, by which he elected to pass the property to his guardianship account ; or if he had charged himself with it in the probate court as guardian, there would be little difficulty in adopting this conclusion. The real question on this part of the case is, whether, without any such act,

⁵ See *Williams vs. Storrs*, 6 *Johns. Ch. R.* 353.—*Doolittle vs. Lewis*, 7 *Johns. Ch. R.* 45.

without any admission of assets, or any admission of responsibility as guardian for the amount, a court of equity is bound to make that application for the party, which he has not made for himself. In this respect, it differs materially from *Taylor vs. Deblois*; and therefore is not necessarily governed by it. In that case the Court said, "the general principle in cases of retainer is, that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands." I see no reason, upon a review of the authorities, to doubt the accuracy of this statement; and it is supported [by *Burdett vs. Pix*, (1 *Roll. Abridg. Executors* L. 3, l. 45,) (2 *Brownlow. R.* 50,) and *Woodward vs. Lord Darcy*, (*Plowden R.* 184.)]⁶

Ordinarily, such a presumption of retainer by way of satisfaction, may properly arise, because the party may be presumed to do his duty, and to elect to have payment made, of any debt due to him by representation or otherwise, in consonance with his duty. But such a presumption may be rebutted by circumstances, or controlled by the acts of the party. In most of the cases of retainer, the party avails himself of his right by plea or otherwise; or it is made available by some act of his representative. And there is no presumption of an intentional breach of duty, or of an abandonment of the right of retainer. But in cases, like the present, where the rights of third persons are concerned, as of the sureties on the administration bond, and of the sureties on the guardianship bonds, a distinction may properly arise. Some act or election to hold the property in a different character from that in which it is received, may justly be insisted on, before the responsibility is shifted from one class of sureties to the other. Besides, here the administrator never admitted the assets to be in

⁶ See *Toller on Executors*, b. 3, ch. 3.

his hands. He held them secretly as his own, without acknowledgment, and settled his probate account without any admission of them. If he meant to apply them to the guardianship account, his plain duty was, in the settlement of 1808, to have credited the estate of *Ferguson* with the amount, and thus discharged himself as administrator, by charging himself as debtor on the guardianship account. His omission to do this appears to me to afford strong presumption, that it never was his intention to pass the proceeds to the guardianship account. And unless such was his intention, this Court cannot now, upon principles of law, direct it to be done. He had a right to hold the property as administrator, until a settlement in the probate office, if such was his choice; and at all events as between the sureties to the different bonds, there is no ground upon which the Court can say, that the law has changed the character, on which the assets are to be accounted for, since they were received. I cannot but have a strong suspicion, that the real intention of the party was, silently to appropriate the proceeds to his own use, in the same way as he would have been entitled to do, if his wife *Isabella* had survived her father, and not have died before him. The form in which the administrations are taken out in *England*, demonstrates a studious desire to hold up the impression, that *Isabella* died after her father, and that her husband was her sole legal representative as to this property. The mistake could hardly have found its way into the administration by mere accident. If it did, however, it does not change the posture of the inferences deducible from the other facts.

No case has been cited, which comes up to the present in its circumstances. The nearest approach, which I have met with, is the case of *Weeks vs. Gore*, cited in Mr. Cox's note B. to 3 P. Will. 184. But there, though the creditor-administrator had made no election to retain his debt during his life, it was presumed, that he intended to pay his own debt first out of the assets, and his executors set up the right of retainer accordingly.

It appears to me, that in the present case there is no ground upon which the Court can say, that by operation of law, or otherwise, the assets have passed from the administration account to the guardianship account.

Another ground of defence, which is relied on in the answer, and has been strenuously argued at the bar, is the statutes of limitations of *Rhode Island*. The lapse of time, too, since the giving of the administration bond, is relied on, to establish a presumptive extinguishment of liability under it. It may well be doubted, under the circumstances of this case, where there has been a fraudulent concealment of the assets, the existence of a long minority, and as far as the evidence goes, an entire ignorance on the part of the minors of their own rights, and of the facts leading to them, whether the mere lapse of time ought to furnish any bar to relief in a court of equity, without some other controlling equities on the part of the defendants to fortify it. But this need not be decided, for reasons hereafter stated.

The bar under the statutes of limitation is twofold ; (1.) it relies on the common statute, (*Digest of 1798, p. 471,*) limiting personal actions, and especially actions on the case, to six years. This statute is, for the most part, a transcript of the statute of 21 *Jac. 1, ch. 16*. Upon this part of the defence, it is unnecessary to say more, than that the present suit is brought to enforce a right growing out of a bond or specialty, and is not, either in terms, or by implication, an action within the scope of that statute.

The other statute relied on, is the act for limiting suits against executors and administrators. (*Digest of 1798, p. 300.*) That act provides, "nor shall any action be brought against any executor or administrator in his said capacity, unless the same shall be commenced within three years next after the will shall be proved, or administration shall be granted ; provided such executor or administrator shall give notice of his appointment," &c. Now the defendants aver due notice of their appointment according to the statute, and that more than three years have

elapsed since they took the administration upon themselves. The bar, then, is complete, by the express language of the statute. Why then should it not avail in a suit in equity, as it most assuredly would in a suit at law? It is said, in the first place, that the statute of limitations does not bind courts of equity. That position, certainly, cannot be maintained in the broad extent in which it is stated; for in cases of concurrent jurisdiction it is clear, that courts of equity are bound by the statute equally with courts of law. That was the doctrine of Lord *Redesdale* in *Hovenden vs. Lord Annesley*, (2 Sch. & Lefroy. R. 607, 630,) and Mr. Chancellor *Kent*, in *Kane vs. Bloodgood*, (7 Johns. Ch. R. 90.) There are other cases, not of concurrent jurisdiction, in which the statute of limitations is applied by courts of equity by way of analogy to the law, in which courts of equity follow the law, and give effect to its regulations upon equitable titles. *Bond vs. Hopkins*, (1 Sch. & Lefr. 413, 428,) *Cholmondely vs. Clinton*, (2 Jac. & Walker R. 1.) *Kane vs. Bloodgood*, (7 Johns. Ch. R. 90, 110,) and *Murray vs. Coster*, (20 Johns. R. 576, 582,) expound and illustrate the reasons of the doctrine with great ability. In this last class of cases, equitable exceptions may well be admitted and justified, because the bar is furnished by the court itself, and stands upon no positive legislation.

Now, in the present instance, the suit is strictly an action against the executors, and it is in a case where the foundation laid, as against them, rests solely on a bond, which is suable at law. Independent of that bond no contract exists, by which they are bound; and no equity is stated in the bill against them or their testator, except the naked obligation arising from the suretyship of the latter. It is strictly a case, therefore, as to them of concurrent jurisdiction.

But it is said, that here is a case of fraud, and that fraud, even at law, constitutes a good exception to the statute of limitations; and *a fortiori* has been often admitted in equity. This, in a

general sense, is true as to the common statute of limitations. But then the fraud must be the fraud of the party, setting up the bar of the statute. This statute of limitations, as to executors and administrators, is not created for their own security or benefit; but for the security and benefit of the estates, which they represent. It is a wholesome provision, designed to produce a speedy settlement of estates, and the repose of titles derived under persons who are dead. If this statute could be avoided by any fraud, (on which I give no opinion,) it must be a fraud of the executors or administrators themselves, and not of third persons, with whom they have no connexion or privity. There is no pretence of any such fraud in this case on their part, or the part of their testator. All of them are innocent, both in fact, and in construction of law. How, then, can the fraud of a third person avoid a plea of this nature? It is also material to state, that if fraud be set up to a bar of the statute, the fraud so operating should be stated in advance in the bill, as an avoidance of it, so that thereby the fact may be put in issue. It is not sufficient to prove such a fraud in evidence, for the decree must be not only *secundum probata*, but also *secundum allegata*. If the plea is nakedly pleaded, and the bill does not set up the fraud, to avoid it, nothing is in issue but the truth of the plea itself.

If then the debt be barred, and is no charge on the executors, it can be no charge on the estate of the testator, either real or personal. It falls by its own infirmity, and attaches to nothing. If a testator charges his lands with payment of his debts, it is only with debts which are subsisting, and may be enforced against his estate, and not with debts not admitted, nor capable of being enforced against his assets. The trust is coextensive with the subsisting debts, and dies with them.⁷

⁷ See *Burke vs. Jones*, 2 Vez. & Beames, 275.—*The Executors of Fergus vs. Gore*, 1 Sch. & Lefr. 107, 109.

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I may add, that in *Massachusetts*, where a like statute exists, the uniform construction has been, that the lapse of the prescribed term extinguishes the debt, so that even a subsequent acknowledgment by the executor or administrator will not revive it.⁸ And in such case, a judgment against the administrator himself does not bind his sureties in a suit brought on the administration bond; but the extinction of the debt may be set up by them as a bar thereon. The obvious policy of the statute well warrants the conclusion indicated by these decisions.

The Court has thus far travelled through the points made and argued at the bar. But if the difficulty last suggested were not insuperable, there would remain for consideration a very important point, and that is, whether all the proper parties for a decree are before the Court. The doubt with me is, whether there could be any decree, unless an administrator of *R. M. Ambrose* were before the Court. His accounts as guardian have never been adjusted; nor, so far as respects the assets now in controversy, has there been any allowance or settlement of the charges accruing from the getting in of those assets. Yet it is obvious, that no decree could be equitably had against the executors of *Langley*, except for such a balance as should be due them on a settlement of both of their accounts. The Court might, in consideration of the insolvency of *R. M. Ambrose*, and the want of an administration on his estate, get over the difficulty of refusing relief against a surety without bringing the principal before it, with a view to contribution over. But when it cannot render any just decree without the liquidation of demands, which cannot be brought before the Court, without an administrator being appointed, can it be, that it ought to render a decree against an innocent surety, which it has no means of ascertaining to be founded

⁸ *Danes vs. Shaw*, 15 *Mass. R.* 6.—*Emerson vs. Thompson*, 16 *Mass. R.* 429.—*Thompson vs. Brown*, 16 *Mass. R.* 172.

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either in law or equity? At present, the objection strikes me as very cogent, and well deserving of grave debate.

Upon the whole the bill must be dismissed.

Bill dismissed accordingly.

JOHN RICHARDS AND OTHERS vs. RICHARD K. RANDOLPH.

Under the statute of *Rhode Island*, for the conveyance of real estate, if there be a defective acknowledgement of the deed by which the title is intended to be conveyed, the deed is void, as to all persons except the parties and their heirs, and therefore a subsequent purchaser, for a valuable consideration, from the grantor, may acquire a good title thereto.

EJECTMENT for land in *Bristol, Rhode Island*. Plea, the general issue.

At the trial, the plaintiffs, to support their action, offered a deed from *George D'Wolf* (who was admitted to be the then owner of the land) to them, dated the 9th of December, 1825, in *Boston*, in *Massachusetts*, and acknowledged on the same day before a magistrate there, but the acknowledgement was not under his seal, and recorded on the 10th of December 1825, in *Bristol* records. *George D'Wolf*, at the time of the execution of both deeds, was an inhabitant of *Bristol*.

Randolph objected, that the deed was not effectual to convey the land, because the acknowledgment was not under the seal of the magistrate, as is required by the statute of *Rhode Island*, (*Digest of 1822*, p. 202.)

He further offered, in support of his title, a subsequent deed of the premises from *George D'Wolf* to himself, executed in *Bristol*, on the 23d of February 1826, and duly acknowledged. It was a deed in trust for the benefit of certain creditors of the grantor. It was also admitted, that there was an attachment, by

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process, on part of the premises, and that upon the execution which issued thereon, the same was sold at a sheriff's sale, and purchased by *Randolph*. The attachment was made on the 13th of December 1823; the execution issued on the 10th of July 1826; and the sheriff's deed to *Randolph*, was dated on the 13th of August 1827.

Searle for the plaintiff, *è contra*.

STORY J. I am clearly of opinion, that the plaintiffs have not made out their title. The acknowledgement of the deed made to them by *George D'Wolf* is fatally defective. The statute of *Rhode Island* (*Digest of 1822, p. 202, &c.*) provides, that no estate of inheritance or freehold, or for a term exceeding one year, in lands, shall be conveyed, unless by deed duly acknowledged and recorded in the town clerk's office, where the lands do lie. Where the party grantor, "*doth not reside*" in the state, the acknowledgement may be before a magistrate "in the state or country where such party shall reside," who is "to certify the same under his *hand* and *seal*." Where the party is within the state of *Rhode Island*, the acknowledgement must be before some proper magistrate thereof. The second section of the act then provides, "that all bargains, sales, and other conveyances whatsoever of any lands &c., and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, *shall be void*, unless they shall be acknowledged and recorded as abovesaid; *provided always*, that the same *between the parties and their heirs* shall nevertheless be valid and binding."

Now, the acknowledgement in this case is not under the *seal* of the *Boston* magistrate, and therefore it is fatally defective on this account alone. But the grantor was not, at the time of the execution of the deed, *resident* in *Massachusetts*, within the sense of the statute, and therefore no acknowledgement could be good before any such foreign magistrate. The grantor was transiently at *Boston*, and it is admitted, and is indeed notorious from the

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description in the deed itself, as well as otherwise, that his residence and inhabitancy were then in *Bristol*, in *Rhode Island*. The plaintiffs, therefore, upon their own showing, have not made out a perfect title. The defendant claims title under a subsequent *bonâ fide* deed in trust for creditors. Admitting the title of the plaintiffs then to be good between them and *D^r Wolf* and his heirs, it cannot bind the defendant, claiming under a distinct title, adverse to the plaintiffs.

Plaintiff discontinued.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM 1828, AT WISCASSET.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

WILILIAM B. WALLACE vs. THOMAS AGRY AND OTHERS.

Assuming that a foreign bill of exchange, payable after *sight*, ought to be presented within a reasonable time, that time must be judged of with reference to the usage among merchants as to delays in the negotiation and transmission of such bills.

THIS cause was again tried by the jury at this term. In addition to the testimony formerly in the case,¹ there was evidence, that in *Boston* and elsewhere in *America*, the usage and understanding among merchants was, that upon foreign bills of exchange payable *after sight*, the holder was under no obligation to present them for acceptance at any particular time. He was at liberty to consult his own discretion. In short, that no time was known or recognized among merchants, within which the presentment should be made; but the holder might keep the bill any length of time he pleased. There was also evidence of a like nature, and tending to the same result, as to the usage and understanding among merchants at the *Havana*. There was also evi-

¹ See *ante*, *Maine, May Term, 1827, at Portland*, vol. iv. page 336.

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dence, that foreign bills drawn at the *Havana* on *London*, and elsewhere, were often sent to different ports of the *United States*, for negotiation and sale ; and no particular time was understood to be fixed, within which they should be negotiated, and no particular modes of conveyance, direct or otherwise, by which they should be sent to *London*. In many instances, they were sent to *Spain* and *France* first, when drawn on *London* ; and in many instances, to the *United States*. No law or usage existed requiring them to be sent direct to *London*. In respect to foreign bills it did not appear from the evidence, that the *Spanish* law differed in any material respect from the general commercial law of *England* or *America*.

The cause was argued by *Mitchell* and *Greenleaf* for the plaintiff, and by *Daveis* and *Longfellow* for the defendants.

STORY J., in summing up the case said, that the Court adhered to the doctrine given to the jury at the former trial. As far as the new evidence went, it corroborated, in point of usage, that, which the Court supposed to be the *Spanish* law. That, at all events, if the doctrine were correct, that foreign bills, like the present, were required to be presented within a reasonable time, on which the Court would not give any absolute opinion ; still the evidence in the case of the usage of merchants, if not good evidence of the law, was evidence as to their understanding of what was reasonable time, and in that view proper for the consideration of the jury : that with reference to such usage, he would put it to the jury to say, whether the present bill was not, in point of fact, put into negotiation, or transmitted for presentment, within a reasonable time. If the jury thought it was, then so far as this point was essential to the plaintiff's cause, he was entitled to their verdict.

The judge then adverted to the other points made in the cause, affirming the former doctrine held by the Court.

The jury found a verdict for the plaintiff.

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An open boat is not a *ship* or *vessel* within the purview of the statutes of 1820, ch. 122, and 1823, ch. 150, which prohibit commercial intercourse from the *British* colonies.

It seems, that, notwithstanding those statutes, open *British* boats may visit the *United States*, if not destined for trade.

British ships or vessels excluded from our ports by those statutes, are such as are owned by *British* subjects, having a *British* domicile, and sailing under the *British* flag, and not ships or vessels owned by *British* subjects domiciled in the *United States*.

LIBEL of seizure for violation of the navigation and intercourse acts of 15th of May 1820, ch. 122, and of 1st of March 1823, ch. 150, against an open boat and her tackle and lading.

The information alleged, (1.) that this was a boat or vessel, owned wholly, or in part, by *British* subjects, and that she came and arrived by sea, from some part of the province of *New Brunswick*, within the port of *Eastport*; (2.) that sundry goods, not of the growth and manufacture of the *United States*, comprising the boat load, were shipped and waterborne on the waters of the *Bay of Passamaquoddy*, for the purpose of being exported into *New Brunswick* in said boat, &c. not being a vessel of the *United States*.

The facts, as proved, were as follows. The boat was under five tons in burthen, and was without a deck, and had on board, at the time of the seizure, 28 barrels of tar and pitch, with which she was bound from *Eastport* to *St. Andrews*, in *New Brunswick*. She had no custom-house papers on board at the time of the seizure, and it did not appear, that such papers had at any time been taken out for her. She was owned by *British* born subjects, who, with their families, had resided and been domiciled at *Eastport* for several years; and her home was admitted to be at *Eastport*.

The goods on board were claimed by *Joseph C. Noyes*, a citizen of the *United States*, residing at *Eastport*.

Shepley (District Attorney) for the *United States*.

The first inquiry is, whether this boat is included within the class of vessels excluded from the *United States* by the act of May 15, 1820.

The word "vessel," as applied to maritime affairs, is understood to mean any vehicle used for transportation on the water; and if the word is used in the act according to its common acceptance, the act clearly excludes boats owned by *British* subjects, from our waters. And if such is the sense in which the word is used in the laws of the *United States* generally, it may safely be concluded to have been so used in this act.

In the first registry act of September 1, 1789, ch. 11, (*Brown's edition*,) the language used is, "ship or vessel," to designate all water-craft; and when it is intended to exclude any of the small craft, a limitation is made by stating the tonnage.

In section 22, it is provided, that "the master or owner of every *vessel* of less than twenty tons and not less than five tons" — "shall cause the name of *such vessel* to be painted," &c.

In the coasting act of February 18, 1793, ch. 153, sections 1, 4, and 6, "ships or vessels," of less than twenty tons, are spoken of; and in section 26, "ships or vessels" of more than five tons; and in the 37th section is a provision, that the act shall not extend to boats or lighters of a specific class, thereby implying, that it does extend to other boats and lighters.

In the collection act of 2d March 1799, ch. 128, section 92, foreign merchandise is required to be imported on "ships or vessels" of less than thirty tons, except in certain districts, thereby implying, that such importation in those districts may be made in "ships or vessels" of less tonnage without limitation.

In the act of 29th July 1813, granting "allowances to certain *vessels* employed in the fishery," section 5, "ship or vessel" is used, and the limitation established by the tonnage. In the 6th section, "boat or vessel" is used, and the limitation is made by the tonnage. And so in sections 7 and 8, "vessel" and "ship

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or vessel " are the terms used. It is believed the term vessel is used in the laws of the *United States*, as including all water-craft, and that a limitation is expressed where one is intended.

Where the language of a statute is plain, courts will never look after the motives of the lawgiver, or the objects intended to be effected ; they do so only where the language is obscure or contradictory, or where from some other cause the mind is left in doubt, whether the statute embraces the case. Believing that this statute is neither doubtful nor obscure, but that it determines clearly, that vessels of all classes from *New Brunswick*, owned by *British* subjects, are excluded from our waters under penalty of forfeiture ; the propriety of arguing whether a particular class, *to wit*, boats, come within the evils intended to be remedied by the statute, is not admitted ; but while it is not admitted, such an inquiry is not to be feared.

The object of *Great Britain* seems to have been, to give to her own subjects the navigation and trade to her colonies in the *West Indies*.

The object on our part, to counteract that policy and prevent the intended effect of it.

The *British*, by excluding us from the *West Indies*, hoped to secure for themselves " the long voyage " from these provinces, or from our country to the *West Indies*. The *United States* hoped, by excluding all these provincial vessels from our ports, to operate as strongly against their navigation, as their own laws were calculated to operate in its favour. Whatever, therefore, would tend to depress and injure their shipping interest, and to deprive them of the fruits they intended to reap, would be in furtherance of the policy of this government. Hence we should expect to find our government extending the exclusion as far as it might lawfully do. It could not extend the exclusion beyond the provincial vessels, without a violation of the commercial convention of 1815. And it has done what would be expected of it. It has not stopped at the exclusion of *British West India* ves-

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sels, but has excluded all her provincial vessels without discrimination. To limit the exclusion to a particular class of these vessels, would be doing less than this government had a right to do, and less than her counteracting policy required should be done. And *just so far* as a limitation of the exclusive system is made, *so far* the *British* shipping remains uninjured, in the enjoyment of the advantages intended to be extended to it by the *British* laws.

If a distinction is to be made in the classes of vessels excluded, and not excluded, by what rule is the Court to be guided in making it? What shall be the tonnage of those not excluded? Will the Court look into a foreign statute book to fix this rule, and so make the rule change, as foreign legislation varies? Can any limitation be adopted, confining the operation of the statute to *British* subjects domiciled abroad? Such a construction would be contrary to our whole system of navigation as exhibited in the registry and coasting acts; and would give all the trade to *British* built vessels, changing only the domicil of the owners.

Suppose at the passage of the act of 1820, amendments had been offered, limiting the act to vessels navigating according to the regulations of the *British* plantation trade; or to vessels *documented* as *British* vessels; or to vessels with *decks*; can one doubt that each of these propositions would have made a material alteration in the act, and would have required and received very grave deliberation before it had been adopted?

“*De minimis non curat lex*” cannot be applied to the boat navigation; it would be out of place.

On what is believed to be another erroneous construction of the statute, is founded an objection to the sufficiency of the first allegation in the libel. The words “shall enter or attempt to enter” the ports of the *United States*, are supposed to mean something more than coming within those ports. It is not perceived what other meaning can be attached to them, unless they require an entry at the custom-house. Such a construction would make Congress declare, that *British* vessels should be excluded

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from our ports, and yet might come within them and do as they pleased, if they would avoid the custom-house.

On a careful examination of the act it will be perceived, that the coming "by sea" is applied to the vessels of *Lower Canada* only, and the reason of it is obvious; *Lower Canada* being the only place mentioned in the act where arrivals in any other mode, to any extent, could be expected.

In relation to the second allegation in the libel it may be remarked, that the exports by the act of March 1, 1823, section 5, are limited to "any vessel of the *United States* or any *British* vessel," navigated, as prescribed, to the enumerated ports.

By the 6th section, the act "so far as the same shall apply" to the intercourse "in *British* vessels, shall cease to operate in their favour," on the President's issuing his proclamation,—and by the proclamation it has *so far* ceased to be operative, and no farther. The act, then, remains in force to require exports "in any vessel of the *United States*" to be made to the enumerated ports; and to prohibit exportation in vessels, not vessels of the *United States*, by confining the exports to vessels of the *United States*. To adopt any other construction, is to erase the words "in any vessel of the *United States*," and read the act as if those words had never had place in it. But why is there such language used in the other section, that the President's proclamation shall cause the act to cease so far as it respects *British* vessels; if nothing was intended to be regulated but *British* vessels? Why was not the act in terms suspended entirely, if such was the intention? Why such pains-taking, in the language of the act, to exclude the very result now contended for, if nothing was intended by it?

Although the policy of confining exports to our own vessels, and in those, to certain enumerated ports, may not be seen; the inquiry is not whether the policy is wise, but whether Congress has so enacted. Judicial tribunals do not assume the responsibility of erasing certain parts of a statute, because the wisdom of

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its provisions is not seen. Great might be the alterations in statutes, if such a rule were adopted.

C. S. Davies for the claimant. The navigation of the *United States*, in the sense in which it comes into view by international regulations, is defined by the early acts of Congress. What shall be deemed *vessels of the United States*, is determined by the provisions of our registry and coasting laws; settling how they shall be *constructed, documented, owned, and manned*, to entitle them to privileges of that national description, and discriminating the rates of *tonnage* established in their favour against foreign vessels.

The lowest scale of tonnage, coming within the description of vessels of the *United States*, in the terms of their navigation acts, is *five tons*. Nothing in the provisions of the act for regulating the coasting trade and fisheries (section 37) extends to any boat or lighter not masted, or not decked (open), employed in the harbour of any town or city. The colonial intercourse, sought for by the government of the *United States*, is not capable of being carried on in vessels of a description inferior to what are legally denominated "*vessels of the United States*," and against which the measures of *British* legislation are directed. The act of 1820 is only pointed against *British vessels* arriving by sea. There is nothing in any of the respective provisions of *Great Britain* or the *United States*, that looks to a conflict of boat navigation. There has been no controversy on that subject; no measure for retaliation on our part existed in the *English* system. Such light boats are not recognized in the respective registry or enrolment acts, and navigation laws, of either power, more than birch canoes or timber rafts. They are not required to be built, owned, or navigated in any particular manner; they are not subject to tonnage duties; nor reached by any provisions of national policy.

The allegation in the first article in the information certainly is, that this boat was a *British vessel*, within the meaning of the

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act of 1820. What sort of *British* vessel was contemplated by the policy of the acts of 1818 and 1820? The answer is, those that were protected and set apart, by the policy of the *English* navigation and plantation system, for the engrossment of the commercial intercourse between her *American* dependencies, and the *United States*. The act of 1818 touched, if I may so say, the very *pupils* of the *British* system. It bore immediately on *British* vessels, which had directly "*cleared out*" from, or circuitously touched at, any port or place in the *British* dominions, from which our navigation was excluded. It forbid their *entering* or attempting to *enter* the ports of the *United States*, under forfeiture of vessel and *cargo*. And every *British* vessel which should duly "*enter*" our ports, and take on board productions of the *United States*, was required to "*give bond*" (pursuing the pattern of the *English* plantation provision, 28 *Geo.* 3, *ch.* 6, § 3,) also (act of navigation, *Stat.* 12, *Car.* 2, *ch.* 18, § 19,) to land them without any part of the *British* dominions from which our vessels were debarred by the *British* laws of navigation. There is nothing in all these provisions, that relates to the regulation of *boats*.

The act of 1818 is defined to be a "non-intercourse, in *British* vessels, with ports closed, by *British* laws, against the vessels of the *United States*."²

The supplementary act of 1820, was intended to arm and invigorate the act of 1818. It applied a special interdict to *British* vessels; vessels owned wholly or in part by *British* subjects; coming or arriving by sea from any part of the *British* dominions in this hemisphere. It prohibited their *entry*, or attempting to "*enter*," under pain of forfeiture, as before; and bonds were again required of *British* vessels *duly entered*, not to discharge articles of the produce of the *United States* shipped on board, for

² *Documents* 19th Cong. 2d sess. 1826, No. 2, p. 43.—Letter of Mr. Adams to Mr. Rush, June 23, 1823.

exportation, in any of the prohibited places. The 3d section prohibited *importation* into the *United States* from any of the foregoing *British* dependencies, of any articles not produced therein, specially. This act established "a non-intercourse in *British vessels* with all the *British American* colonies, and a prohibition of all articles" except the produce of each colony respectively imported directly from itself.³

By the act of 1823, Congress suspended the provisions of the acts of 1818 and 1820, in respect to certain *British* colonial and provincial ports, and authorized importation in certain *British* vessels, coming directly therefrom, of colonial produce, on one condition, that the same might be exported therefrom to this country, on equal terms, in vessels of the *United States*, the *British* vessels thereby admitted "*being navigated by a master and three fourths of the mariners, at least, British subjects.*" The next section (§ 3) provided for equalizing the duties on *tonnage*.

The act of 1823 was apparently designed as a counterpart to the statute of 3 Geo. 4, c. 44, 1822. That statute allowed *American built vessels, lawfully navigated*, to *import* certain goods directly to the *West Indies*, and *export* colonial produce in their own bottoms. The trade authorized by this statute, (like that secured by the commercial convention to be carried on with the *East Indies*,) was to be conducted in ships *built in the United States, whereof the master and three fourths of the mariners, were American.* This act established the free ports enumerated in our act of 1823, and authorized the importation of certain specified articles, either in *British* built vessels, owned and navigated according to law, or in vessels of the built and ownership of the country, in which the articles imported had their origin, and authorized exportation, in the same description of vessels, direct to the country where the vessel belongs.

³ *Documents of Congress, ut supra.*

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By the statute of 3 *Geo.* 4, c. 45, the national commerce of the colonies, in exports and imports, is limited to *British vessels, owned and navigated according to law.*

The act of Congress of 1823, corresponding to these provisions (§ 5), enacted, that it should be lawful to export to any enumerated *British* port, in *any vessel of the United States*, or in *any British vessel, navigated as required by the 2d section*, and having come directly from any of the enumerated ports, articles of the growth, produce, or manufacture of the *United States*, or imported therein, under the restriction therein provided.

The *proviso* to the section relates exclusively to exportation in *British vessels*, and requires, that when exported in any such *British* vessel, *bond* shall be taken by the collector of the port, at which she shall have *entered*, for the due landing of the goods at the enumerated port, for which she shall have *cleared* out. The bond was to be given before shipment. No goods were allowed to be exported to any other than one of the enumerated ports, nor to be shipped on board any *British* vessel, except one coming direct from such port.

And it was further enacted by the proviso, that "in case any such articles should be shipped or waterborne for the purpose of being exported contrary to the act, they should be forfeited."

This act of 1823, was intended to meet and reciprocate the act of Parliament of 3 *Geo.* 4, c. 44, establishing the free ports enumerated by our law. The regulations respecting exports and imports are understood to have been, in a legislative sense and measure, squared with the provisions of that act. The intercourse which was opened to our vessels in direct voyages to the free ports by the act of parliament, was opened also to *British* vessels, coming directly from, and returning directly to, the same ports, by the act of Congress.

British vessels, such as are privileged in the "trade and intercourse" before mentioned, were the subjects of this *reciprocal* measure ; and the original *retaliatory* interdict was left to ope-

rate upon the same privileged vessels, either coming from, or going to, any other than one of the free and enumerated ports. And the previous interdict was further armed by the clause condemning goods either shipped, or waterborne, for the purpose of shipment, contrary to the force of this determined regulation. The whole measure seems to have had a final relation to the *West India* trade and intercourse; and the object appears to have been, to prevent exportation directly on board such *British* vessels, or indirectly and clandestinely by intermediate conveyance. *British* and *American* vessels, the respective objects of national protection, are thus brought into *opposition* by the principles and terms of the two corresponding acts; and the act of Congress makes a special provision to prevent the liberty allowed to *British* vessels, from *exceeding* the measure granted to ours.

The two acts of Parliament and Congress, taken together, constituted a sort of legislative *convention*, for the time being. Hence the language of the 5th section of the act of 1823, that "it shall be lawful to export from the *United States*, directly to any of the *British* colonial ports enumerated, in any *vessel of the United States*, or in any *British* vessel navigated," as the 2d section prescribed, &c. The terms employed are mutual; but the power of the act does not operate on vessels of the *United States*. So far as our laws were concerned, our vessels were at liberty before; and the only obstruction was from *British* legislation. After this act of 1823 was passed, there was nothing else, beside the act of Parliament, to limit our vessels to the free or enumerated ports. Our act did not extend to prevent them from going to any other ports. In regard to them, *viz.* "vessels of the *United States*," its words had no legal meaning. The *restrictive* terms of the act of 1823, apply emphatically to *British vessels*, "being navigated by a master and three fourths, at least, of the mariners, *British* subjects." Its force is *expended* on them. The prohibition is not put upon *export*. The qual-

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ification or disqualification, is only fixed upon the character and quality of the *carrier*. The prohibition does not extend beyond the class of vessels, that were *privileged* by *Great Britain*.

The inference, which the Attorney for the government is understood to draw from the evidence in this case, is, that the boat was going to *St. Andrews*, which was one of the enumerated ports; and to which it would have been lawful, under the act, to export in a *British* vessel, coming directly from that port. And the employment of the boat is contended, by the Attorney, to have been between *Easport* and *St. Andrews*. This is supposition,—but if the *defence* rested on that point, there is no positive proof of that fact, (*viz.* arriving from *St. Andrews*,) in favour of the boat.

But the operation of the act is annulled by the contingency provided for in the 6th section; the trade and intercourse between the *United States* and the *British* colonial ports having been subsequently prohibited by a *British* order in council, and the provisions of that act thereupon ceasing to operate in favour of *British* vessels, so far as it extended to them, as announced by the President's proclamation of 17th March 1827; and the acts of 1818 and 1820 are thereby revived in full force. That the act of 1823 was thereby in effect repealed, was decided by the District Judge in the case of the *Atlantic*, December Term, 1827. Erasing from the act the regulation in regard to *British* vessels, it is emphatically asked, *What is left?*

The idea of an *implied prohibition*, a *penalty* by *implication*, raised constructively from the mention of “vessels of the *United States*,” in the terms of the act, will not stand the test of legal principles. Although within the permissive words of the act, there was nothing within the terms of the prohibition but *British* vessels of the privileged class; nor is there anything else upon which they can act. It may be very true, that the present boat was not a proper “vessel of the *United States* ;” but there can be no pretence for considering it a *British* vessel within the con-

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temptation and meaning of the act; and although it be not the one, it is no matter, as long as it be not the other.

The allegation, that this was not "a vessel of the *United States*," may be, technically, true enough, but it draws no consequence after it; but it will be difficult to sustain the allegation of its being a *British* vessel, to bring it within the act of 1820. It may be granted, that the persons represented as owners do not come within the requirements of our registry act. Neither is it a *British built, owned, and navigated vessel*, within the intendment of the act of 1820. The boat does not come within the scope, policy, and provisions of the act in reference to entry, bonding, tonnage. It is not a vessel "coming and arriving by sea within the sense of the statute."

The allegation in the first article of the information is defective. It does not state any *entry*, or *attempt to enter*. The *coming and arriving by sea* does not constitute the offence. It is only a sort of inducement to its taking place, or more properly, perhaps, an indication of its character. The vessel so *coming and arriving*, being *British*, is *excluded*. It is the vessel *entering* or *attempting* to enter, that is *forfeited*; and the language of the act has reference only to the class of vessels capable of coming to *entry*.

It is submitted, therefore, with great deference, that a decree of forfeiture cannot be sustained on either allegation.

It is not questioned that such a boat, in proceeding to discharge its lading on the opposite shore, might come in contact with some law there established, to prevent importation in other than their own privileged shipping; but the exportation supposed to be intended in the present case, was an *American* enterprize entirely.

STORY J. This is a libel of seizure founded on the acts, prohibiting commercial intercourse with the *British* colonial possessions, of the fifteenth of March 1820, ch. 122, and the first of March 1823, ch. 150, as put into operation by the President's proclamation of the 17th of March 1827.

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The questions raised in the case depend upon the true construction of these acts, and upon the conformity of the libel thereto, so as to present the point of forfeiture. The act of 1820 provides, that "after the 30th of September, then next, the ports of the *United States* shall be and remain closed against every vessel, owned wholly, or in part, by a subject or subjects of his *Britannic Majesty*, coming or arriving by sea from any port or place in the province of *Lower Canada*, or coming or arriving from any port or place in the province of *New Brunswick*," &c. And it then proceeds to declare, that "every such vessel so excluded from the ports of the *United States*, that shall enter or attempt to enter the same, in violation of this act, shall, with the cargo on board such vessel, be forfeited to the *United States*."

The first remark, which I would make on this clause is, that it inflicts no forfeiture upon an excluded vessel, unless she enters, or attempts to enter some port of the *United States*; and it is, therefore, necessary that the libel should, in substance, contain an allegation of such entry, or attempt, before the Court can pronounce a decree of condemnation, however clearly the facts may be made out.

Now, the first count in the libel, which alone touches this statute, contains no such allegation. It merely affirms, that "the vessel or boat aforesaid was a vessel, owned wholly or in part by a subject or subjects of his *Britannic Majesty*, and came and arrived by sea from some port or place in the province of *New Brunswick*, to the Attorney unknown, within the port of *Eastport* aforesaid, contrary to the form of the statutes," &c. This is not an allegation in strict conformity with the words of the statute. The words "arrive" and "enter" are not always synonymous, and there certainly may be an arrival, without an actual entry, or an attempt to enter. Perhaps an arrival *within* a port, cannot be without an entry into the port. But still, it seems to me, that courts of law are not to inflict forfeitures, without the substantial phrases of the statute being used. And I am by no

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means sure, that the Court would be warranted in giving judgment, where the words departed so widely from those of the statute. It would seem inconsistent with the rules usually adopted in the administration of penal laws. This point, however, is less important, because the libel is open to amendment; though the strong inclination of my opinion is, that without an amendment no condemnation could be pronounced, if the case were ever so clearly in favour of the government. The coming or arriving *by sea* is confined, by the immediately succeeding words, to *Lower Canada*, and any coming or arriving is prohibited from *New Brunswick*, whether by sea or otherwise. In this respect, I adopt the criticism of the District Attorney as well founded. This informality in the allegation is no otherwise important, than that it ties up the case to narrower evidence, than the act itself requires.

The important question however is, whether the facts present a case within the real scope and operation of the statute. The facts are these. The owners of the boat are, and have been for several years inhabitants of *Eastport*, and have with their families a *bonâ fide* domicil there. The boat itself is less than five tons in burthen, is open and without any deck, and her home also is admitted to be *Eastport*. The owners are *British* born subjects, and have not, so far as any evidence exists in the record, changed their national allegiance. At the time of the seizure, the boat had on board 28 barrels of tar and pitch, and was bound with them from *Eastport* to *St. Andrews*, in *New Brunswick*. She had no custom-house papers on board, and none appear to have been taken out at any time for her. There is no proof that she ever came from *New Brunswick* and entered, or attempted to enter, any port of the *United States*. Strictly speaking, then, the facts do not, upon this general view, come up to a case of forfeiture.

The intention of the parties, however, is not, as I understand it, to place the cause on this ground. Their wish is to settle a general question of great concern to the navigation with small

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craft, in that part of the country. And as the point has been fully argued, and a decision may save much future litigation, I am not indisposed to meet it upon the merits.

The question is, whether the navigation from the province of *New Brunswick* to a port of the *United States* by an open boat, owned as the present is, is interdicted by the act of 1820. The libel does not charge, that she was employed in trade; and therefore, if the interdiction applies at all, it applies (as has been very correctly remarked by the District Judge) as well to cases, where the boat is employed as a ferry boat, or to make a visit, as to cases, where the object is the transportation of merchandise.

The argument of the District Attorney is, that the boat falls within the general description of the statutes, and is a "vessel" within its terms and meaning; and that she is owned "by a subject or subjects of his *Britannic Majesty*." And if so, she is excluded from entry into our ports.

There can be no doubt, that in a general sense a *boat* is a *vessel*, for it is a "vehicle in which men or goods are carried on the water," which is one of the definitions of a *vessel* given in our lexicographies; and one of the definitions of a *boat*, given in like manner, is, that it is "a vessel to pass the water in," or "a ship of a small size." In a nautical sense, it more usually designates an open vessel, without decks. Whether the word is used in the one sense or the other in a particular statute, must depend upon the context and objects of the statute itself, which may and often do narrow down the general import to specific classes of cases.

The object of the act of 1818, ch. 65, to which the act of 1820 is an explanatory supplement, is to exclude *British* navigation from our ports, which should come from any of the *British* colonies, which were closed against the navigation of the *United States*. Both acts were in their nature retaliatory; and the subsequent acts of 1822, ch. 56, and of 1823, ch. 150, con-

firm this view in the most ample manner. The doctrine of reciprocity lies at the bottom of all of them, and this principally in regard to the islands and colonies in the *West Indies*. That the intention of the act of 1820 was to cut off trade and commerce in *British* ships from *New Brunswick* to the *United States* cannot be doubted; that it went farther, and meant to prohibit all intercourse by water with that province in any *British* craft, is not so clear. If the words of the act would cover such cases, it is by no means as certain, that the policy of the legislature reached to the same extent. It is well known, that the ordinary mode of communication between that province and northeastern frontier ports is by boat navigation; and there does not seem to be any ground to suppose, that Congress intended to prevent the common travel of visitors, or passengers, to and from that province. The second section of the act is manifestly confined to *British* vessels, which are allowed and required to enter at the custom-house in the course of trade. But boats of the present description do not fall within this class. The third section applies to cases of the importation of goods from the colonies, and is necessarily confined to commercial intercourse. The same intention is still more completely demonstrated in the act of 1823, which suspends the acts of 1818 and 1820 as to certain colonial ports, and opens trade with them in *British* vessels. Every provision in this act looks to cases of trade and importation; and to vessels, which by our general laws are allowed to enter and clear at our custom-houses. By the general revenue collection act of 1799, ch. 128, (§ 92) no foreign dutiable goods are allowed to be imported from any foreign ports by sea in any vessel, foreign or domestic, of less than thirty tons burthen. And the navigation act of 1817, ch. 204, is still more restrictive.

I am not aware, that in any of our laws respecting shipping the word "vessel" is applied to any description of boats, like the present. The registry act (act of 1792, ch. 45) invariably uses the words "ship or vessel," as descriptive of the class of shipping,

which it includes. It contains no limitation by tonnage of the size of the ship or vessel ; but the form of the certificate of registry (§ 9) supposes, that such ship or vessel has a deck, mast, &c. And the regulations, prescribed by our laws, for ascertaining the tonnage of ships or vessels for the payment of tonnage duty, and for other purposes of admeasurement, refer to such only as have one or more decks.⁴ The fair inference deducible from these provisions is, that the registry act was not meant to apply to ships or vessels without any deck. In respect to the coasting trade and fisheries, the same phrase, "ship or vessel," is used in the act of 1793, ch. 52, for enrolling or licensing them for such business ; but no ship or vessel less than five tons in burthen seems within the purview of the act, (§ 1, 4, 26.) The form of enrolment, too, presupposes, that the ship or vessel has a deck, mast, &c. ; and her tonnage is to be ascertained in the same manner, as in case of registered ships. There is a provision also, (§ 3,) that registered ships may be enrolled, and enrolled or licensed ships may be registered, which seems, by implication, to limit their sizes reciprocally to tonnage above five tons, and to such as have a deck or mast. This construction is fortified by the language of the 37th section, which declares, "that nothing in this act shall be construed to extend to any *boat*, or lighter, not being masted, or if masted, and not decked, employed in the harbour of any town or city." It is plain, from this clause, that boats without masts or decks were not allowed to be enrolled or licensed for the coasting trade or fisheries. And the fishing bounty is confined to "boats or vessels" of more than five tons burthen.⁵

There are, also, provisions in our laws, which contemplate importations from foreign countries in vessels of a smaller description. But in such cases, the general term "vessel," is not alone employed, but a more specific description is added. Thus, by

⁴ *Act of 1799, ch. 128, § 64.*

⁵ *See act of 1813, ch. 34, § 5, 6.*

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the 105th section of the act of 1799, ch. 128, importations are allowed on the northern and northwestern boundaries of the *United States*, "in vessels or *boats* of any burthen;" and the next section (§ 106) goes on to provide, "that all vessels, *boats*, rafts, and carriages of what kind or nature soever, arriving in the district aforesaid, containing goods, &c. shall be reported to the collector," &c. A distinction between *boats* and *vessels* is here taken; and a distinction does, in fact, exist in common parlance and maritime usage. The term "*vessel*" is never, or at least very rarely, used to designate any watercraft without a deck; but the term "*boat*" is constantly used to designate such small vehicles of this nature, as are without a deck. In *Mortimer's Commercial Dictionary*, a *boat* is defined to be "a small *open* vessel, commonly wrought by oars." He says, that the term "*ship*" is a "a general name for all large vessels." And it appears to me, that the general sense, in which the word "*vessel*" is used in our laws, is in contradistinction to an *open boat*, and excluding the latter. Such is its meaning in the act of 1815, ch. 246, where it is declared lawful "for any collector &c. to enter on board, search, and examine, *any ship, vessel, boat, or raft*," &c.⁶ And when the word is found in our laws without any thing in the context to explain or enlarge its meaning, it appears to me a sound rule of interpretation to construe it as used in that sense, which is its most common sense in maritime usage. Especially ought it to receive such an interpretation, when it interferes with no known policy of the legislature, and a different course would involve general inconvenience.

The strong inclination of my opinion, therefore, is, that open boats, like the present, even if *British* owned, if not employed in trade from the *British* colonies, are not within the scope of the act of 1820. But this case does not turn upon that point alone;

⁶ See also act of 1802, ch. 45, § 8.

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and therefore I leave it for an absolute decision, until it forms the single point for judgment.

There is another question of more importance, at least to residents within the *United States*; and that is, whether this boat was, within the sense of the act of 1820, a vessel "owned wholly or in part by a subject or subjects of his *Britannic Majesty*." It is certain, that our laws allow aliens to build ships in the *United States*, and confer upon them privileges, which are denied to ships built and owned in foreign countries. The former are allowed to be *recorded* in the custom-house, and to receive a certificate thereof, and thereby are subjected to a less tonnage duty than the latter.⁷ It is as clear, that *British* subjects, domiciled in the *United States*, are entitled to hold boats of the same description as the present. And I know of no law, which prohibits them from plying between port and port of the *United States*, so that they are not employed in the coasting trade or fisheries. It does not appear to me reasonable to presume, that Congress had any intention to interdict intercourse, except with vessels belonging to *British* subjects, who retained their national domicil and privileges. If, by the laws of *France*, *British* subjects, domiciled in *France*, might *bonâ fide* own ships, which would be entitled to the privileges of *French* shipping, a ship so owned, and *bonâ fide* bearing the *French* flag, would not seem to me excluded from commerce with this country by the act of 1820. Without entering into the consideration, how far it is necessary to constitute an excluded ship, that she should be owned and registered according to the *British* registry acts, I think the true interpretation of the act of 1820 is, that the words therein, "*British* subject or subjects," mean such subject or subjects as still retain their *British* domicil, and hold their vessels in the character of *British* subjects; and not such as have a domicil in the *United States*, and own vessels, which are protected

⁷ See act of 1792, ch. 45, § 20, 21, 22, 24.—Act of 1790, ch. 57, § 1.

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by the laws of this country, and have their home *boná fide* here. The policy of the *United States* has not been to interfere with merchants domiciled here ; but to exclude shipping sailing under the flag and protection of *England* ; such shipping as, in the sense of the law of nations, would be deemed *British* shipping. By the law of nations, for all purposes of capture and prize, and national character, this boat would be deemed an *American* boat, because her domicil is *American*.

My judgment, therefore, is, that upon the first count the case of forfeiture is not made out in point of fact, because this boat is not, in the sense of the act of 1820, owned, in whole or in part, by subjects of his *Britannic* Majesty.

The second count in the libel is founded on the 5th section of the act of 1823, ch. 150. That act opens commercial intercourse and navigation with certain enumerated *British* colonial ports, and among others, with *St. Johns* and *St. Andrews*, in *New Brunswick* ; and declares it lawful to import in any *British* vessel, coming directly from any of the *British* colonial ports enumerated in the act, which vessels are navigated by a master and three fourths of the mariners *British* subjects, any articles of the growth &c. of any of the said *British* colonies, the importation of which is not from elsewhere prohibited, and which may be exported from the same ports to the *United States* on equal terms in vessels belonging to the States. It prohibits importations in any other manner, or of any other kinds, from the same colonial ports. The 5th section then proceeds to provide, that it shall be lawful to export from the *United States* directly to the same colonial ports in any vessel of the *United States*, or in any *British* vessel, as above described, any article of the growth &c. of the *United States*, or any article legally imported therein, the exportation of which elsewhere shall not be prohibited by law &c. And in the close of the section it declares, " and in case any such articles shall be shipped or waterborne for the purpose of being exported contrary to this act, the same shall be forfeit-

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ed," &c. This is the clause on which the second count of the libel is framed. It propounds, that at *Eastport*, "sundry goods &c. of the growth &c. of the *United States*, composing the lading of the open boat aforesaid, were shipped and waterborne in said boat, on the waters of the *Bay of Passamaquoddy*, in said district, for the purpose of being exported from said States to the province of *New Brunswick*, in the boat or vessel aforesaid, *the said boat or vessel then and there not being a vessel of the United States*," &c.

The 6th section of the act provides, "that this act &c. shall remain in force as long as the enumerated *British* colonial ports shall be open to the admission of vessels of the *United States*, conformably to the provisions of the *British* act of Parliament, of the 24th of June, 1822. (Statute of 3 *Geo.* 4, *ch.* 44.) But if at any time the trade and intercourse between the *United States* and all or any of the enumerated ports, authorized by the said act of Parliament, shall be prohibited by a *British* order in council, or by act of Parliament, then, from the day of the date of such order in council, or act of Parliament, or from the time the same shall commence to be in force, proclamation to that effect having been made by the President of the *United States*, each and every provision of this act, so far as the same *shall apply to the intercourse between the United States and the enumerated colonial ports*, IN BRITISH VESSELS, *shall cease to operate in their favour*; and each and every provision of the act," of 1818 and 1820, "shall revive and be in full force." The President made his proclamation according to this provision, on the 17th of March 1827, and thus the acts of 1818 and 1820 were effectively revived.

The true interpretation of this 6th section of the act has been matter of considerable argument at the bar. Is it, in the given case of the occlusion of the enumerated *British* colonial ports, virtually repealed in all its provisions, as to intercourse and trade with them, as the introductory clause seems to intend? Or is it

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repealed only as to intercourse and trade in *British vessels*, leaving the intercourse and trade in *vessels of the United States* under the regulation of the 5th section, as a substantive and existing enactment; as the latter clause of the 6th section seems to intimate? The latter is the construction contended for by the District Attorney, and on which the second count rests; the former is maintained by the counsel for the claimant.

The act of 1818 contains no provisions excluding trade, either by way of importation into the *United States*, or exportation from the *United States*, except in *British vessels*. Not a word is said respecting the vessels of the *United States*, or of any other foreign country, except *Great Britain*. The 1st and 2d sections of the act of 1820 are limited in the same manner. The 3d section prohibits the importation of any goods &c. from the province of *Nova Scotia*, the province of *New Brunswick*, the islands of *Cape Breton*, *St. Johns*, *Newfoundland*, or their respective dependencies, from the *Bermuda* islands, the *Bahama* islands, the islands called *Caicos*, or the *British* possessions in the *West Indies*, or on the continent of *America*, south of the southern boundary of the *United States*, except such goods &c. as are the growth &c. of such provinces, islands, and possessions, where the same shall be laden, and from whence they shall be directly imported into the *United States*. Nothing is said as to *exportations* from the *United States* of any goods whatsoever in vessels, *not British*. The main object of the act of 1823 was to open the intercourse and trade with certain enumerated ports in those prohibited colonial possessions, upon the principles of reciprocity held out by the act of 3 *Geo.* 4, *ch.* 44. The four first sections respect importations solely in *British vessels*. In the 5th section, for the first time, occurs any provision relating to exports, and there the phrase is, (as has been already stated,) it shall be lawful to export from the *United States* &c. in any vessel of the *United States*, or in any *British* vessel, &c.

The first remark, that is called for by this posture of our legislation is, that as to *British vessels*, the whole intercourse and

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trade, provided for by the act of 1823, is completely suspended, and the exclusion of them, by the acts of 1818 and 1820, entirely revived. Thus the retaliatory system is put into complete operation; and that, which alone seemed within the legislative intention, the exclusion of *British* ships coming from, or going to, ports, where *American* ships were excluded, universally prohibited. The next remark is, that no legislative intention is anywhere avowed to interdict trade or intercourse in *American* vessels to or from any colonial ports. The next remark is, that though the 5th section of the act of 1823 contains an *affirmative* clause, that it shall be lawful to export from the *United States* to the enumerated ports, in any vessel of the *United States*, any goods &c.; yet there is no *prohibitory* clause, declaring any such exportation in any vessels, not of the *United States*, and not *British*, unlawful. Now, upon general principles of interpretation, no prohibition can be implied from merely affirmative words. The affirmative words may repeal or suspend a prohibition theretofore created, but *per se* they cannot create one. The forfeiture in the last clause of the 5th section applies only to cases, where articles shall be shipped or waterborne, for the purpose of being exported, "*contrary to the provisions of the act.*" To inflict it, therefore, it must be established, that some prohibition exists in the act, which has been violated. Where is the prohibition of such exportation in vessels not *British*, and not strictly vessels of the *United States* in the sense of the registry act? None such has been pointed out; and if it had existed, it would not have escaped the scrutinizing sagacity of the District Attorney.

Assuming, then, that the 5th section, as to vessels of the *United States*, remains in full force, it is merely affirmative; there was no antecedent prohibition of exportation other than in *British* vessels; the present boat is not, in the sense of the act, such a *British* vessel; and consequently the second count falls for want of sufficient facts to maintain its vital averments.

The decree of the District Court must be affirmed and

Restitution accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

NEW HAMPSHIRE, OCTOBER TERM, 1828, AT EXETER.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
Hon. JOHN S. SHERBURNE, District Judge.

RICHARD SHERWOOD vs. RICHARD SUTTON.

In *New Hampshire*, in an action on the case, for a deceitful representation in a sale, the statute of limitations was pleaded in bar. The plaintiff replied, that there was a fraudulent concealment of the deceit, until within six years. It was *held*, that the replication was a good answer to the plea.

In cases of *concurrent* jurisdiction, such as accounts, bailments, &c. courts of equity construe the statute of limitations as courts of law do, and create no other exceptions, than those created by the statute. Courts of equity, in such cases, act in *obedience* to the law, and not merely in *analogy* to the law.

THIS case was argued upon a motion in arrest of judgment at the last May Term, by *Saltonstall* for the defendant, and by *Mason* for the plaintiff.

STORY J. Upon the posture of this case, the single question now presented for the consideration of the Court is, whether the replication to the plea of the statute of limitations is, in point of law, (the issue upon it having been found in favour of the plaintiff,) a sufficient avoidance of the plea, so as to entitle the plaintiff to judgment upon the verdict.

The statute of limitations of *New Hampshire*, of 16th June, 1791, (*New Hampshire Laws*, p. 164,) is, in substance, a transcript of the statute of 21 *Jac.* 1, *ch.* 16, so far as it respects personal actions of this nature; and it contains like exceptions in favour of infants, *femes covert*, &c. It contains no special exception, however, as to actions founded on fraud, where the fraud has been concealed during the period of the common limitation; and therefore, the legal propriety of creating such an exception must depend upon the same principles here, as it would depend upon in the courts of *Westminster Hall*. There is, indeed, this consideration of no inconsiderable weight, that as there is no State Court in the judicial establishment of *New Hampshire*, which possesses general equity powers, the remedy, if it is to be administered at all, must be administered in such cases through the instrumentality of a court of law; and hence the doctrines of courts of equity, where they are susceptible of incorporation into remedies at the common law, find a more ready admission in the State courts, than perhaps would occur, if courts of chancery had an independent existence. It would not, therefore, be matter of surprize, if in such State courts, in the construction of the statute of limitations, cases should be extracted by implication from the reach of its provisions, which a court of equity would hold to be saved by virtue of its general principles.

It is certainly true, as has been contended at the bar, that the decisions of courts of equity in respect to the construction of statutes are not always to be admitted to be safe guides for courts of law, because they often arise from principles of remedial justice, wholly confined to the former courts, and inapplicable to the latter. It is not uncommon for courts of chancery to give relief in cases of unwritten contracts respecting land, against the letter of the statute of frauds, as in cases of part performance, fraud, and other springing equities, where courts of law would wholly abstain from any interference. The reason is, that the nature and extent of the relief to be

granted depends so much upon circumstances, and is so much to be modified by the exercise of a sound discretion, that the proper decree could never be made to assimilate to a judgment at law. An attempt therefore to afford a remedy by a mere general judgment for either party would often work as much or more injustice, than it would cure. But such abstinence is not always observed; and an illustration of the opposite course, working a beneficial effect, may be derived from the known class of decisions under the acts for the registry of deeds of real estate. In this class of cases, courts of law have silently created an exception, in favour of a prior unrecorded deed, against the second grantee, having notice of it at the time of his purchase, following, in this result, the clear doctrine of courts of chancery. The reason is, that the same effectual remedy may be applied, by postponing the second, to the first deed at law, upon the ground of intentional fraud, as equity would administer by a decree directing a perpetual injunction, or a conveyance of the estate in favour of the first grantee.

The statute of limitations does not, in its terms, embrace suits in equity, but appropriates its language to actions at law. And, primarily, the legislative intention must be deemed to be limited to such actions. But it must be obvious, that where courts of equity deal with legal titles and legal demands, it could never have been the legislative intention, that they should not be bound by the provisions of the statute. It would otherwise happen, that a legal title or demand, utterly extinct at law, would be recognized as subsisting in equity. It was, therefore, very justly said by Lord *Redesdale*, in *Hovenden vs. Lord Annesley*, (2 Sch. & Lefr. 607, 630,) "that the statute must be taken virtually to include courts of equity; for when the legislature by statute limited proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated, that equity followed the law; and, therefore, it must be taken to have virtually enacted, in the same cases, a lim-

itation for courts of equity also." With reference to such cases, (i. e. of legal titles and demands,) the remark of his Lordship is emphatically true, that courts of equity do not act merely by *analogy* to the statutes, but in *obedience* to them.

This doctrine is strictly applicable to all cases, where courts of law and equity possess a concurrent jurisdiction, such as in matters of account, in certain kinds of fraud, bailments, &c., where the statute is just as much pleadable, as a bar, in equity as at law. On the other hand, there are many cases, where courts of equity act, in the application of the statute of limitations, by way of *analogy* only ; as when they apply it to merely equitable rights and titles, not at all cognizable at law. In refusing or granting relief, they here consider the lapse of time, as furnishing a rule to bar the claim, by reference to the positive rules prescribed by the statute of limitations in legal titles or demands of a kindred nature. I do not go over the cases ; but the whole doctrine will be found expounded with admirable clearness and force in *Bond vs. Hopkins*, (1 Sch. & Lefr. 413, 426,) and *Hovenden vs. Lord Annesley*, (2 Sch. & Lefr. 607, 629,) by Lord Redesdale ; and in *Cholmondely vs. Clinton*, (2 Jac. & Walk. R. 1,) by Sir Thomas Plumer, whose doctrine was confirmed in the House of Lords by Lord Eldon and Lord Redesdale ; (2 Jac. & Walk. 189, note ;) by Mr. Chancellor Kent, in *Kane vs. Bloodgood* ; (7 Johns. Ch. R. 90, 110 ;) and by Mr. Chief Justice Spencer, in *Murray vs. Coster*, (20 Johns. R. 576, 582.) I gladly refer to such authorities, lest I should weaken the strength of the reasoning by my own imperfect comments. In the recent case of *Robinson vs. Hook*, (4 Mason R. 139, 150, 152,) in this Court, the subject was discussed very much at large, so far as it touched implied trusts.

Now, whatever may be said as to the authority of those decisions upon the statute of limitations, which courts of equity, acting upon equitable titles and demands only, have made by way of *analogy* to the law ; it can scarcely be said, that the decisions in

cases of concurrent jurisdiction, in which they profess to act in obedience to the law, ought not to be of great authority, as just expositions of the true intent of the statute. And hence, as I think, this class of cases has been very properly relied on in courts of law to furnish just rules for the legal interpretation of the statute; for courts of equity, dealing with legal rights and demands, are just as competent, as courts of law, to ascertain their extent and limitations.

Let us, then, in the first place, examine the decisions of courts of equity in cases of concurrent jurisdiction, so far as they apply to the question now in judgment. The present is such a case. It is an action for a fraudulent representation and deceit; and the jury have found, that there has been a fraudulent concealment of the deceit, until within six years before the commencement of the suit. How far has such a concealment been held to constitute an avoidance of the bar of the statute of limitations?

One of the earliest cases is that of *Booth vs. Lord Warrington*, (4 Bro. Parl. Cas. 163,) which was a case of concurrent jurisdiction, upon the ground of money paid by imposition, and now sought to be recovered back. The money had been paid more than nine years before the commencement of the suit, but the imposition was not discovered or known to the plaintiff, until after the lapse of the nine years. The statute of limitations was pleaded in bar, and finally overruled, and the decision was confirmed by the House of Lords. Lord Redesdale says, (2 Sch. & Lefr. 634,) that the ground of the decision was, "that as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate, because, until discovery, the title to avoid it does not completely arise." And from the questions put to the judges, it may be fairly inferred, that the decision proceeded upon grounds common to courts of law and equity. The case of *Western vs. Cartwright*, (Select Cases in Ch. 34, S. C. 2 Eq. Abridg. 10, pl. 11,) appears to justify the same conclusion, as

Lord *Redesdale* has justly observed, in the case already referred to.¹ Then came the case of the *South Sea Company vs. Wymondsett*, (3 *P. Will.* 143,) where the doctrine was amply confirmed, and the true ground of *Booth vs. Lord Warrington*, (4 *Bro. Parl. Cas.* 168,) was clearly stated. *Deloraine vs. Browne*, (3 *Bro. Ch.* 633,) manifestly proceeded upon the assumption of the same doctrine; and, indeed, the counsel on both sides admitted its general correctness. I cannot find, that the authority of these cases has ever been doubted or denied; and it is very certain, that in analogous cases, even of mere equitable titles and demands, principles of the like nature have been constantly acted upon by courts of chancery. The inference deducible from this view of the cases is, that the construction adopted by these courts, that the concealment of the fraud avoids the bar of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute. I do not stop to inquire, whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be, that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong. Nor do I perceive any thing in *Battley vs. Faulkner*, (3 *Barn. & Ald.* 288,) which prohibits us from taking this view of the point. That case proceeds upon the ground, that the plaintiff's right of action was complete, the breach of the contract being known to him more than six years before the commencement of the action. The only question was, whether a subsequent special damage created a new cause of action, and the court held, that it did not.

In the next place, let us see, how this case has been treated at law. Now, the first remark, that suggests itself is, that there is

¹ *S. C.* 13 *Viner. Fraud. Z. pl.* 3, page 842.—See also *Kane vs. Bloodgood*, 7 *Johns. Ch. R.* 90, 122.

not to be found a single case in *England*, during the period of two centuries since the enactment of the statute, in which a court of law has been found to deny the application of the doctrine to suits at law ; and more than a century ago, the very question was put, by the House of Lords, to all the judges, and no trace can be found of any adverse opinion given by them.

On the other hand, there is the leading case of *Bree vs. Holbeck*, (*Doug. R.* 655,) where, upon the face of the pleadings, the direct question was put, whether fraud would, if concealed, put aside the plea of the statute of limitations. The difficulty in that case was, that the replication did not impute any fraud to the defendant, though it was clear, that the mortgage was a mere forgery. Lord *Mansfield* there said, "there may be cases, too, which fraud will take out of the statute of limitations. But here, every thing alleged in the replication may be true, without any fraud on the part of the defendant. If he (the defendant) had discovered the forgery, and then got rid of the deed, as a true security, the case would have been very different." It is by no means a just representation of this case to consider this language as a mere dictum of Lord *Mansfield*. He must be understood to have spoken in the name of the Court ; and the leave granted to the plaintiff to amend, and reply fraud in the defendant, is proof, that the Court entertained no doubt upon the principal point. If they had entertained any doubt, as there was an ample argument, why should it not have been expressed ? This case has been often cited, both at law and in equity, since its decision, and the doctrine of Lord *Mansfield* has never been denied in *England*. It has often been quoted, as the citations at the bar abundantly show, as good law by elementary writers.² In *Short vs. M^cCarthy*, (8 *Barn. & Ald.* 626,) the case of *Bree vs. Holbeck* was cited by council on

² See 4 *Bac. Abridg. by Guillim. Limitations*, D. p. 476.—*Esp. Dig. N. P.* 151.—2 *Com. on Contracts*, 499.—2 *Starkie Evid.* 890.

both sides without objection, and was not in the slightest degree impugned by the Court. The principal point there was, that the new promise, relied on to take the case out of the statute, was substantially different from the original cause of action; and the original cause of action, which was negligence in an attorney, was held to have accrued at the time the negligence occurred, though the plaintiff had no knowledge of it until a subsequent period. Mr. Justice *Bayley*, on that occasion, said "if the want of knowledge could take the case out of the statute of limitations, it would be competent to the plaintiff to state this in his replication." It was not so stated; nor was there the slightest pretence of fraud. In *Clarke vs. Hougham*, (2 *Barn. & Cresw.* 149,) the action was for money had and received, and the statute of limitations was pleaded, and the parties were at issue upon the general replication of a promise within six years. The plaintiff obtained a verdict, and upon a motion for a new trial, one of the questions argued at the bar was, that there had been fraud and misrepresentation, which took the case out of the statute. But the Court were of opinion, that the pleadings did not raise that point, and if intended to be made, there should have been a special replication of the fraud. Mr. Justice *Best* however said, "It has been answered, that fraud prevents the operation of the statute of limitations. It is not necessary to decide that now; but I think it would have done so, had the replication raised the point." In *Granger vs. George*, (5 *Barn. & Cresw.* 149,) which was trover for the non-delivery of certain deeds, there was a plea of the statute of limitations, and the general replication, that the action did accrue within six years. Upon the trial, there was no proof, that the plaintiff knew of the conversion until within six years, although it had taken place long before. The Court were of opinion, under such circumstances, that the case was not taken out of the operation of the statute, the action accruing at the time of the conversion, "there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining

knowledge of that which had been done." The mere fact of a want of knowledge, without fraud, was not of itself sufficient. It appears to me difficult to escape the conclusion, that if, in these late cases, where the point was brought directly to the judgment of the Court, the doctrine in *Bree vs. Holbeck* had been seriously doubted, that some suggestion to that effect would have fallen from the bar or bench. A total silence, under such circumstances, would not be insignificant. But the positive affirmance of the doctrine by Mr. Justice *Best* is strong evidence of the actual state of the law in *England*.

It remains to examine the *American* cases, which, with one exception, which I shall have occasion hereafter to mention, are admitted to be all one way, and in conformity to *Bree vs. Holbeck*. One of the earliest cases is *Jones vs. Conoway*, (4 *Yeates R.* 109,) where the point was directly decided by the Court. Then came *The First Massachusetts Turnpike Corp. vs. Field*, (3 *Mass. R.* 201,) where to a plea of the statute of limitations, there was a replication of a fraudulent concealment of the breach of the contract; and the Court, upon full argument, sustained the replication, affirming, that the cause of action ought not to be considered as having accrued, until the plaintiff could obtain the knowledge, that he had a cause of action. "If," said the Chief Justice, "this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud." And he relied on the cases of *The South Sea Company vs. Wymondsell*, and *Bree vs. Holbeck*, as authorities. The doctrine of this case has been fully recognised and acted upon in the recent cases of *Homer vs. Fish*, (1 *Pick. R.* 435,) and *Welles vs. Fish*, (3 *Pick. R.* 74,) and constitutes the settled law of *Massachusetts*. In *Bishop vs. Little*, (3 *Greenleaf R.* 405,) the same principle was sustained; at the same time, that it was denied, that want of knowledge without fraud would take a case out of the statute, following the line of distinction in the cases of *Short vs. M'Carthy*, and *Granger vs. George*.

The case of *Troup vs. The Executors of Smith*, (20 Johns. R. 33,) which was an action of assumpsit on a special contract, and contained the money counts also, certainly supports a contrary doctrine, and being decided upon special pleadings, where the very point was presented by an averment, "that the fraud and deceit were not discovered by the plaintiff until a long time after the contract was to be performed," &c., and was deliberately considered, must be admitted to possess high authority. The replication did not aver in terms, that the fraud had been concealed by the party so as to prevent a discovery; but only, that the fraud was not discovered by the plaintiff. The Court, however, reasoned the case upon the general principle. The decision was, that the right of action did accrue as soon as the original fraud was consummated; and not at the time when the plaintiff first discovered it; and that a fraudulent concealment was not a good answer to a plea of the statute. Mr. Chief Justice *Spencer*, in delivering the opinion of the Court, examined the authorities with his usual accuracy and clearness. He considered the cases in courts of equity inapplicable, upon the ground, that they resulted from their peculiar jurisprudence, operating upon the conscience of the party, and the statute not being addressed to, or obligatory upon them. The case of *Bree vs. Holbeck* was adverted to by him as containing only a dictum of Lord *Mansfield*, and therefore unfit to guide the judgment of a court of common law in this point. In the absence of all controlling authority, he deemed it the duty of the Court to adhere to the letter of the statute, and not to introduce an exception not included in any of its provisos.

If the point were entirely new, and left untouched, both at law and in equity, the reasoning of the learned judge would justify much hesitation in introducing such an exception. Perhaps it would be conclusive against any attempt to go beyond the precise terms of the savings of the statute, as a limitation of duty most fit for those, who are to construe the statute, and not

to create an exception beyond its terms. But it is to be remembered, that most, if not all the statutes of limitations existing in the several states of this Union have borrowed the language of the statute of 21 of *James*. In all the revisions since the *American* revolution, the same general enactments have been preserved; and it cannot be doubted, that the expositions of the statute, which had been adopted in *England*, both at law and in equity, were well known to those, who framed our own. Under such circumstances it would not be unnatural to suppose, that these expositions were received as the true interpretation of the text. It does not strike me, therefore, that the expositions of the statute by courts of chancery are to be rejected in such cases, unless they turn, not upon the words of the statute, but upon some equity peculiar to such courts, and not cognizable at law. For if such courts profess to expound the statute upon a general principle, which must equally apply to courts of law; and *a fortiori*, if they profess to follow the law, (as they certainly do in cases of *concurrent* jurisdiction,) then, as has been already remarked, their decisions may justly be deemed authorities for the guidance of courts of law. With great deference it appears to me, that the learned judge has not adverted to, or given sufficient weight to this consideration; and I cannot but think, that if his own luminous judgment in the subsequent case of *Murray vs. Coster*, (20 *Johns. R.* 576,) in which the distinction is so clearly drawn, had been then before him, he would not have been disposed to have pressed the argument against this class of chancery decisions quite so far. At all events, my own judgment does not justify me, in a case of concurrent jurisdiction, in rejecting their just influence as authoritative expositions of the statute, *valere quantum valere possent*.

In this conflict of *American* decisions, it is the duty of the Court to adopt that, which seems built upon the better reason, or at least which upon an equipoise seems most consonant with public convenience and justice. I put the case in this way, because I

am not called upon to discuss the point, as if it was an original one of first impression, unaffected by judicial intimation or opinion. I desire to be understood, as utterly disclaiming any intention of expressing what, under such circumstances, my opinion would be. The case is affected by judicial decisions, and the choice is fairly given to follow that, which is most consonant to the local jurisprudence of *New Hampshire*.

What, then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason, on which the exception is built, and not merely, that there is an equity binding upon the conscience of the party, which the statute does not reach or control. Nor is this mode of interpretation of statutes new in courts of law. The case under our registration acts concerning real estate, where notice deprives a second grantee of his priority, has been already mentioned; and, as far as I know, the doctrine pervades the courts of law throughout this Union. It certainly is the received doctrine in every State of the first Circuit. Many other cases will be found collected in *Bacon's Abridg. title, Statute, H. 5, 6, 7, 8*; and *Com. Digest, Parliament R. 10 to 16*. Even the statute of limitations has received an equitable construction in cases, where the mischief was the same as that expressly provided for. *Lethbridge vs. Chapman*, (15 Vin. Abr. 103,) *Wilcocks vs. Huggins*, (2 Str. 907, S. C. Fitzg.

R. 170, 289,) and *Kinsey vs. Hayward*, (1 *Lutw. R.* 97,) which are recognized as good law in *Hickman vs. Walker*, (*Willes R.* 27, 28,) are strong examples. The cases of *Strithurst vs. Græme*, (2 *W. Bl.* 723, *S. C.* 3 *Wils. R.* 145,) *Ruggles vs. Keeler*, (3 *Johns. R.* 267,) *White vs. Bailey*, (3 *Mass. R.* 271,) and *Fowler vs. Hunt*, (10 *Johns. R.* 464,) though less stringent, appear to me to carry the construction beyond the literal import of the words to the substantial objects of the statute.⁴

Now, if any exception out of the words of the statute is to be created by implication, I can scarcely conceive of one, which stands upon better reason than that now insisted on; for it is in furtherance, and not in evasion of the legislative intention. It is material to state, that the point is not, whether mere ignorance of the fact on the part of the plaintiff ought to remove the bar; but whether this ignorance, resulting from the fraudulent concealment of the fact by the defendant, ought to have that effect. It was said, at the bar, that the reasoning of Mr. Chief Justice *Parsons*, in 3 *Mass. R.* 201, is not characterized by his usual ability and strength. But it seems to me, that it meets the objection in the only manner, in which it can be met, that is, by affirming, that the Court would violate a sound rule of law, if it permitted the defendant to avail himself of his own fraud. That is not denied by Mr. Chief Justice *Spencer*, who puts his opposition to the doctrine upon the words of the statute, and the inability of a court of law to dispense with its obligation, or to create exceptions. It may be fairly presumed, that the fact, that in *New York* cases of this sort were remediable in chancery, had some influence in inducing him to adhere to the letter of the statute. For myself, I must say, that in a case of concurrent jurisdiction, if remediable in equity, it ought to be so at law; for the same reason applies to both courts.

⁴ See also *Comyn. Dig. Temps.* (G. 9, &c.)—5 *Dane Abridg.* ch. 161, art. 1, 10.

Sherwood vs. Sutton.

My opinion accordingly is, that the replication is good, and the plaintiff is entitled to judgment upon the verdict. I found myself upon this ground, that in *England* there is an uniform course of equity decisions in favour of the doctrine, and no inconsiderable weight of common law authority in the same direction, and none, not even a dictum, against it; that in *America*, courts of law, in at least four states, have adopted it; that if a different rule be proper in States having a general equity jurisprudence, the same rigid construction ought not to apply to other States, where it is excluded; and that in the State courts, which are governed by a legal jurisprudence most consonant with, and influencing that of *New Hampshire*, it has been established in the most solemn manner.

Let judgment therefore be entered for the plaintiff.⁵

Judgment accordingly.

⁵ See *Robinson vs. Hook*, 4 *Mason R.* 139, 150, 151.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM 1828, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

DANIEL OSBORNE, Administrator of *David Osborne*, deceased,
vs.

JOSHUA BENSON AND ELIZA, his wife.

Where a mortgage had been given to one partner to secure a debt of a firm, and after the failure of the firm, and an assignment of the debt, one of the partners entered into an arrangement with the debtor, without the consent of the assignees, by which he took negotiable notes for the debt payable on time, and afterwards he assigned the mortgage to the other partner, who was not party to the arrangement; it was *held*, that the mortgage was not extinguished.

WRIT of entry sur intrusion brought by the demandant as administrator of *David Osborne*, deceased, upon a mortgage, and counting on the seizin of the intestate, *David Osborne*, in fee and in mortgage, and an intrusion by the tenants after his death. Plea, the general issue.

At the trial, it appeared in evidence, that one *David Dean*, was entitled to $\frac{1}{4}$ th part of the demanded premises, as heir of one *Jeremiah Bumstead*, who died seized of the estate, intestate. *Dean*, on the 31st of January, 1823, executed a mortgage to *J. B. Osborne*, (who was in partnership with the intestate,

David Osborne, under the firm of *D. & J. B. Osborne*,) of his share in *Bumstead's* estate, and purporting to be for the security of \$500, payable in one year after *Bumstead's* estate was settled. A note dated the preceding day, (the 30th of January,) for the same sum, payable to *J. B. Osborne*, at the same time was also executed, and delivered, with the mortgage, to *J. B. Osborne*. On the 28th of July, 1823, *J. B. Osborne* assigned the same mortgage to the intestate, *David Osborne*.

The tenants claimed the premises under a subsequent deed from *David Dean* to the tenant, *Eliza Benson*, (then *Eliza Griffen*), dated the 16th of August, 1824, and purporting to be a conveyance, in consideration of 450 dollars, of all *Dean's* share in *Bumstead's* estate. The defence was, that nothing was due under the mortgage from *Dean* to *Osborne*, and that the same was fully extinguished, or satisfied.

The facts were somewhat complicated. But the material facts were these. The mortgage to *J. B. Osborne* was given upon a contract, entered into by *Osborne*, that the firm should deliver to *Dean*, or his order, goods in *Boston*, to the amount of \$500, suitable for the *Penobscot* market and trade at *Prespect*, of such qualities and sorts, &c. as *Dean*, or his agent, should request, on the credit stated in the mortgage. A similar note and mortgage was executed to *J. B. Osborne*, at the same time, by one *Daniel F. Weeks* and his wife, (who was also an heir in like degree as *Bumstead*), for a similar consideration. *J. B. Osborne* gave to *Dean* and *Weeks*, severally, a note in his own name, promising to deliver goods to them severally to the amount of \$500, as abovementioned. Upon the next day, (the 1st of February,) these notes were given up by the parties, and by consent, a single note was given by *J. B. Osborne* to deliver to *Dean* alone, or his administrator, goods to the amount of \$1000. On the same day, *Dean* wrote on the same note an order on *J. B. Osborne*, for a delivery of the goods to *Weeks*, and to charge them in account with *Dean*. In the same month, (Feb-

ruary,) the firm of *D. & J. B. Osborne* delivered goods, under the order, to *Weeks*, to the amount of \$903.88 ; and upon a settlement of accounts with *Dean*, on the 25th of April 1823, it appeared, that the amount then due from him to the firm of the *Osborne's* was \$1009.97. At that time the *Osbornes* had failed, and the account against *Dean* had been assigned to their assignees ; but the mortgages, and notes accompanying the same, from *Dean* and *Weeks* to *J. B. Osborne* had not been assigned, (though intended to have been), and have never since been formally assigned to their assignees. The settlement of the account between *J. B. Osborne* and *Dean* took place at the house of *Osborne* ; and with a view to prevent *Dean's* being then broken up in business, it was agreed between them, that *Dean* should give two negotiable notes for the amount to *Osborne*, one for \$509.97, payable in nine months, and one for \$500 payable in twelve months. Nothing was said, at the time, between them, as to giving up the mortgages, or notes accompanying the same, and they were retained by *J. B. Osborne*. The new notes were given accordingly by *Dean*, and the account receipted by *Osborne* in the name of the firm. The assignees had no knowledge of, and were not parties or assenting to, this arrangement. Some time afterwards a demand was made upon *J. B. Osborne* to deliver up one or other of the sets of notes, but he declined doing any thing about it.

The settlement and division of the estate of *Bumstead* was made in the probate office for *Suffolk* county on the 12th of September 1825.

Upon these facts, *Parker*, for the tenants, contended, that the original mortgages to *J. B. Osborne* were extinguished and satisfied by the taking of the negotiable notes, under the arrangement on the 25th of April 1823 between *Osborne* and *Dean* ; and that, consequently, the subsequent assignment by *Osborne*, to the intestate of the demandant, in July 1823, passed nothing.

Bartlett, for the demandant, contended, *é contra*, that there

was no such extinguishment, or satisfaction under the circumstances.

STORY J. My opinion is, that upon the facts, as argued, there has been no extinguishment or satisfaction of the mortgage sued on. If the goods delivered were in compliance with the original contract, entered into between *Dean* and *J. B. Osborne*, and on account of the mortgage, (which as a matter of fact must be left to the jury,) then the mortgage is a valid security upon an executed consideration. If the goods were not so delivered, then *J. B. Osborne* is still liable on his contract, and the mortgage is valid, as founded upon an executory contract, still subsisting and binding between the parties. In the latter view, the giving of the new notes would be wholly immaterial, since they would be in payment for other goods. But the presumption is so strong, that the goods were furnished under the original contract, that it seems difficult to resist it. Taking the fact to be so, how can the new negotiable notes operate as an extinguishment of the debt on account? That debt, at the time when these notes were given, had been assigned to assignees by the partners, to whom it was due. The assignees were ignorant of and not parties to the arrangement, by which they were received. *Dean* knew of the failure and assignment, and consequently knew, that *J. B. Osborne* had no longer any authority to extinguish, or receive payment of the debt, or to receive negotiable notes for it. These notes were, therefore, given without consideration. The mortgage given to *J. B. Osborne* was undoubtedly given in trust for the benefit of the partners, and not for *J. B. Osborne* alone. Indeed, it does not appear, that it was the intention of the parties to the arrangement itself, that the mortgage should be extinguished; or that it should no longer be a security for the debt. The inference from the acts of the parties is the other way; for it was not cancelled or surrendered. They may have intended only to substitute a definite time for the payment of the

Osborne, Administrator, *vs.* Benson *et ux.*

debts for an indefinite time ; a certain, for an uncertain credit ; a protection of *Dean* from suit for nine and twelve months ; and that the mortgage should still stand security for the debt. I will leave the facts to the jury, if the counsel wishes it ; but supposing the facts to be, as I have assumed them to be, I am of opinion, that there was no extinguishment of the mortgage in point of law.

The counsel for the tenants then consented, that the latter should be defaulted, which was done accordingly.

JOHN A. CUNNINGHAM & WILLIAM J. LORING

vs.

JAMES C. BELL AND OTHERS.

Where a voyage was undertaken to *Havana*, and thence to *Leghorn* and back, and the owners ordered the consignees at *Leghorn*, to apply their funds, estimated at 4600 pezzos, to the purchase, first of 2200 pezzos value of tiles, and the residue to invest in paper ; and the consignees accepting the orders, invested the whole funds in paper, because they fell short of the estimated sum, although a sum of 1750 pezzos might have been so invested ; it was *held*, that the consignees were liable in damages for the breach of orders.

The damages, in such case, are not to be confined to the transactions at *Leghorn* ; but are to be calculated upon the actual injury to the plaintiffs, in the events of the voyage, taking into consideration the markets at *Havana*, and all the other circumstances.

The receipt of the proceeds of the paper after sale, by the master at *Havana*, is not, in point of law, *per se*, a ratification of the purchase, and investment in paper by the owners.

What circumstances amount to a ratification of a breach of orders.

The omission to answer a letter acknowledging the breach of orders, or the omission to state to the party in a letter of complaint, that he will be held responsible, is not, *per se*, a ratification ; but the question is open to the jury, as a matter of fact, whether such ratification ought, under all the circumstances, to be presumed.

Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained, unless the bill of exceptions is waived.

ASSUMPSIT brought by the plaintiffs, who are merchants in *Boston, Massachusetts*, against the defendants, who are merchants in

Cunningham *et al.* vs. Bell *et al.*

Leghorn, in *Tuscany*, for breach of orders as factors and commission merchants. The declaration contained various counts. Plea, the general issue.

The material facts, as they appeared at the trial, upon the points of law in controversy, are summed up in the charge of the Court; and it is thought unnecessary to report them, or give them more in detail.

The cause was argued by *Hubbard* and *Webster* for the plaintiffs, and by *William Sullipan* for the defendants.

STORY J., in summing up to the jury stated as follows: The present action is brought to recover damages for a supposed breach of orders, in a commercial transaction undertaken by the defendants at the request of the plaintiffs. The plaintiffs having planned a voyage from *Boston* to *Havana*, and thence to *Leghorn* and back to *Havana*, for the brig *Halcyon*, commanded by Captain *Skinner*, on the 15th of September, 1824, wrote a letter addressed to the defendants at *Leghorn* of the following purport. "*Boston, September 15, 1824. Duplicate. Messrs. Bell, De Yang & Co. Gent^a. This will be handed to you by Capt. J. Skinner jr., master of the brig Halcyon, belonging to us. We have contracted with Messrs. Atkinson & Robbins of this place, to furnish 600 boxes from Havana to Leghorn, on freight of £4. 10s. and 5 per cent. primage, payable in a bill on London, or in Leghorn currency, at the option of the master, and 600 boxes on half profits for freight, 1000 pezzos to be paid in Leghorn, on account of said profits. As the goods are to be consigned to you, we mention the terms of the contract, to avoid misunderstanding. The whole amount of freight receivable at Leghorn will be about pezzos 4600. Please invest 2200 pezzos in marble tiles, of 12, 14, and 16 ounces; the whiter they are the better. We believe, but are not certain, that the oz. corresponds to the English inch. We annex a copy of our invoice, received by Loring, Cunningham & Co. in 1818-19. The balance,*

after paying disbursements, please invest in wrapping paper, to cost from 35 to 50 pezzos per 100 reams. Captain *Skinner* is to return to *Havana* from *Leghorn*. We wish you to obtain for him some freight, if possible, (excepting tiles and wrapping paper,) with liberty to touch at *Marseilles*, should letters we have requested Messrs. *T. H. Rogers & Co.* to lodge with you, induce him to stop there on his return. With much respect, &c." After annexing the invoice, there was a postscript as follows. "September 20, 1824. The above is duplicate of our respects per *Halcyon*. Please forward the enclosed as soon as received. We send the above, that if time is necessary to furnish the articles therein ordered, you may receive it before the arrival of the *Halcyon*." The original letter, without this postscript, was sent by the *Halcyon*, with the following postscript on it. "P. S. We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which 700 pezzos are to be paid in *Leghorn*. After purchasing the tiles and paying disbursements, you will invest the balance in paper as abovementioned. In previous orders, the reams have been deficient in the proper number of sheets. We will thank you to pay particular attention to this, as well as having all the sheets entire."

The foregoing duplicate, with the postscript of the 20th of September was received by the defendants on the 30th of November following, who on the 9th of December following, replied as follows:—"The order you are pleased to give us for paper and marble tiles, to be paid for out of the freight of the *Halcyon's* cargo from *Havana*, to our consignment, has our particular attention. You have done very right to send us this order, as the wrapping paper cannot be got in readiness before the end of January; and therefore, had it been delayed longer, could not have been in time for your brig *Halcyon*. We have contracted for 5000 reams, at as near your limits as possible, the article being just now in great demand. The tile shall be collected also; and for your future regulation we will note at foot a scale of compar-

ative measurement 'twixt ounces and *English* inches." It is material to remark, that nothing is here said as to the price, at which the tiles were contracted for, so as to put the plaintiffs in possession of the exact sum.

The *Halcyon* sailed from *Boston* for the *Havana* on the 16th of October, and having performed that part of the voyage, and taken in a cargo of 1330 boxes of sugar for *Leghorn*, arrived at the latter port on the 20th of January 1825, and there the cargo was delivered to, and sold by the defendants, who received the proceeds of the same. From the state of the market the funds realized for the plaintiffs fell short of the expected amount of 4600 pezzos, the net amount of freight, including the advance of the 1000 pezzos provided for by the original contract, being, as appears by the account current, only about 3450 pezzos. The disbursements of the brig amounted to 647 pezzos. No tiles were purchased : and no investment at all was made of the 700 pezzos provided for in the postscript ; but the whole of the other proceeds, deducting the disbursements, viz. 2801 pezzos, were invested in 437 packages of wrapping paper and sent in the *Halcyon* to the *Havana*. After the arrival at the *Havana*, the paper was sold and the proceeds received by the plaintiffs. The tiles would have been a far more profitable investment. These are the facts, upon which the plaintiffs have founded their action for damages for a breach of orders, in not investing 2200 pezzos in tiles, as required by the original letters of the 15th and 20th of September.

The first question arising in the case is, as to the nature and extent of the contract between the parties ; for there can be no doubt, that the orders of the plaintiffs, and the acceptance thereof by the defendants, constituted a valid contract upon commission, binding between the parties. It appears to me, that there was a clear undertaking on the part of the defendants to apply the proceeds of the freight, and advances coming into their hands from the cargo of the *Halcyon*, in the manner pointed out in the

orders. I mean, that in the first place, the defendants were to appropriate 2200 pezzos to the purchase of marble tile, and the balance, after deducting the disbursements of the brig, and the balance only, was to be applied to the purchase of wrapping paper. I agree, that the defendants were not bound to execute the orders, unless funds came to their hands; for they did not stipulate to make any advances out of their own monies. But on the other hand, there was no stipulation, that 4600 pezzos should at all events come into their hands, constituting a condition precedent, so that if a less sum should come, the defendants were at liberty totally to disregard the orders of the plaintiffs. The reasonable interpretation of the orders is, that the funds received on account of the plaintiffs should, as far as they would go, be applied to the purchase, first, of marble tiles, and afterwards, if any balance remained, *pro tanto*, of wrapping paper. If, therefore, the whole funds should be absorbed by a purchase of marble tiles, to the extent of 2200 pezzos, there was to be no investment in paper.

The estimate of the probable amount of the freight and advances at 4600 pezzos was undoubtedly designed to direct the discretion of the defendants in the purchase of paper. They had a right to act with reference to that, as the probable funds, which would be realized. If it were necessary in order to secure the paper ready for the return voyage at the proper period, that a preliminary contract should be made with dealers in that article, the defendants were at liberty so to do, and were not obliged to wait the ship's arrival, before they took a step. They were, in this respect, authorized to do whatever the custom of trade, or sound discretion might require, to accomplish the objects of the plaintiffs. And their acts, so done, were obligatory upon the plaintiffs, whether funds afterwards came into their hands or not. It is clear, from the subsequent correspondence, that the parties so understood the matter.

When, therefore, the defendants received the orders of the plaintiffs, they had a right to act upon the presumption of receiving funds to the amount of 4600 pezzos. They were then to consider 2200 pezzos of this sum appropriated to the purchase of tiles. They were to make a deduction of the probable amount of disbursements, which might fairly be calculated at the sum ultimately paid, say 650 pezzos; and they had a right to contract for paper to the amount of the balance remaining of the 4600 pezzos, say to the amount of 1750 pezzos. If they had so done, they would in every event have been justified; and if no more funds had come into their hands than would have paid for the paper so contracted for, and the disbursements, they would have been exonerated from all responsibility for not making any investment in tiles. And if a balance, less than 2200 pezzos had remained, they would have been bound to apply that balance only to an investment in tiles. This is stated upon the presumption, that it was necessary to make a contract for the paper before the arrival of the brig; and that such a contract could not be reasonably made upon the condition, that the paper should be wanted; but, for the interest of the plaintiffs, must be absolute. For if such contingent purchase of the paper could have been securely contracted for, it was the clear duty of the defendants so to have contracted, and not to run the hazard of defeating the primary object of the plaintiffs in the purchase of tiles.

In point of fact, the defendants did purchase paper to the amount of 2601 pezzos, and thus exceeded the orders by the difference between that sum and 1750 pezzos, which was the utmost presumable balance applicable to the purchase of paper. That difference is 1051 pezzos, which might at all events have been invested in tiles.

In order to meet this state of the facts, the defendants contend in the first place, that in their letter of the 9th of December, they communicated to the plaintiffs, that they had purchased 5000

reams of paper for them ; and that the plaintiffs ratified the purchase. Let us see, how that statement is borne out by the facts. The defendants, on the 14th of January 1825, wrote a letter to the plaintiffs stating :—" The wrapping paper ordered by yours of the 15th of September will be in readiness by the end of this month, and we shall have by that time ready to ship, 10,000 marble tiles of 12 ounces, 7600 do. of 14 ounces, and 6200 do. of 16 ounces, which will be about the investment you desire of the freight from the *Halcyon*." This letter, it is to be recollected, was written before the arrival of the *Halcyon*. The plaintiffs, on the 7th of March, answered this letter ; and though they had doubtless then received the preceding letter of the 9th of December, no direct reference is made to it. The plaintiffs say, " We have received your much esteemed favour of the 14th of January, and are gratified with the investment you have directed of the freight for the *Halcyon*."

It may be assumed, that the plaintiffs, when they wrote this letter, knew that 5000 reams of paper had been purchased on their account by the defendants. But as no price was mentioned, it is impossible for them to ascertain, that this was beyond the amount authorized by their orders. The defendants did not give them any information, that it was a deviation from their orders ; and the language of the letter of the 14th of January shows, that the defendants contemplated no deviation ; for they say, that they shall have the tiles in readiness to ship to the amount of the investment desired by the plaintiffs. So the plaintiffs must have understood them ; and if their letter of the 7th of March is a ratification of the act of the defendants in the purchase of the paper, it can be deemed so, only as made in compliance with their orders, unless some information of a deviation is brought home to them. No evidence is offered for this purpose, except what arises from the letter itself ; and in it I can find no such information. However this, as a question of fact, will be left to the jury.

But I am of opinion, that the funds received under the original contract of shipment were not only to be applied to the purchases directed by the plaintiffs, but that the additional 700 pezzos advance, notified in the postscript of the letters of the 15th and 20th of September, which came by the *Halcyon*, were also to be applied by the defendants as supplemental funds to the same purpose. The object of that postscript was, not to change the original orders for purchases ; but to confirm them, and authorize and require the investment of the additional 700 pezzos in pursuance of them. Why it was not done by the defendants is not explained, otherwise than by the defendants' statement, that there were ultimately no half profits on the sale. But I understand, that the 700 pezzos were to be a preliminary advance before the sale, and not to await the event. If there should be no half profits, this advance would be reimbursable by the plaintiffs. The vessel was not to wait for a sale. As to this additional advance, then, the case, as to the non-investment, must stand upon the same ground, as the original funds.

Unless, then, there has been a ratification by the plaintiffs of the purchase of the 5000 reams of paper, at the actual price paid, with a full knowledge of the facts, the ground of defence, to which I have referred, fails. And if there was such a ratification, it does not exonerate the defendants from liability for the non-investment of the funds not covered by the purchase of the 5000 reams of paper.

It is in the next place contended by the defendants, that the 5000 reams of paper having been received on board the *Halcyon*, and carried to the *Havana*, and sold there on the plaintiffs' account, that receipt and sale amount, *in law*, to a ratification of the purchase of the paper, and also of the actual application of the whole funds by the defendants at *Leghorn*. I am not prepared to admit, that the facts stated do, *per se*, in point of law, amount to such a ratification. Whether there has been such a ratification is matter of fact for the consideration of the jury under all the

circumstances of the case. It is not sufficient, that the paper was carried to the *Havana*, and there sold by the master on account of the plaintiffs; for that might have been done, and indeed seems to have been done by him, in the ordinary course of his employment in the voyage, without any communication with the owners. And, surely, they could not be bound by his acts in a case of this nature, if they had no knowledge of any actual or intentional deviation from their orders in the shipment, at the time of the sale. The mere receipt of the proceeds after the sale is not decisive. And, indeed, the jury must decide from all the circumstances, whether the plaintiffs have, in any manner, ratified the proceedings of the defendants. If they have, there is an end of the present action.

In the next place, it is contended by the defendants, that the subsequent conduct and proceedings of the plaintiffs amount to a virtual ratification of these transactions. The correspondence between the parties is mainly relied on for this purpose. The letter of the defendants, dated on the 21st of January 1825, speaks of the arrival of the *Halcyon*, and then adds, "he (Captain *Skinner*) has brought samples of marble tiles, and of wrapping paper, &c. We shall compare them with the goods fixed for you, and then act for the best." There is no pretence, that any thing in this letter admonished the plaintiffs of any intended deviation from their orders. The next letter of the defendants is dated on the 21st of February 1825, and after stating, that the *Halcyon* had sailed yesterday for *Marseilles*, it adds, "the sample of wrapping paper sent us, &c. we found much inferior to any made in this state, and have executed your order with a much better article, although the difference in price bears no proportion. As your account current, after purchasing the paper, which Captain *Skinner* told us was the better article for investment, gave only a small balance, we increased a little the quantity of paper, and sent no tiles." And after stating the account current, and amount of the invoice of the paper, &c., it

farther adds, "Captain *Skinner* has been made aware of the superior quality of this parcel of paper, and that each ream is composed correctly of 20 quires of 24, and not 16 sheets, each, as has been occasionally shipped, so that he will no doubt mark an adequate price for it, because, in reality, *the prices, at which it is invoiced, are reduced, by this difference, below those mentioned in your order.*" Here, then, we have the first notice of the omission of the purchase of tiles, and the reason given for it. The paper, (if we are to believe this statement,) considering its extra quality and quantity, is purchased *below the plaintiffs' limits.* If so, the first error of the defendants was in originally contracting for the purchase of too large a quantity. They purchased to the value of 2801 pezzos, when they were limited to the value of about 1750 pezzos. For this difference no reason is given; except, that it is said, that a small balance only remained in their hands. But if they had purchased only to the extent of the limits of the orders, they would have had 1050 pezzos, beside the advance of the 700 pezzos, equal to 1750 pezzos, to apply to the purchase of the tiles. The plaintiffs, in their reply to this letter, dated the 18th of April 1825, after quoting their original orders, say, "we are exceedingly disappointed, that such positive directions were not complied with; they were given for sufficient reasons, and *without authority to alter them.* You omitted to invest the 700 pezzos on account of the freight of the 150 boxes marked T, which we regret, as we wished the funds at *Havana.* With this, you would have had 4240 pezzos, which would have furnished the tiles, paid disbursements, and have left 1393 pezzos to be invested in paper." The defendants replied, on the 27th of June 1825, stating, "we are extremely hurt, that what we did for your account by the *Halcyon*, in February last, should not have met you approbation, because we acted for the best of our judgment for your interest. Your instructions would have been executed literally, had not the premises, under which they were given, changed. The sum of 700

pezzos, which were to be advanced here on account of half profits of the *Halcyon's* cargo of sugar, *not having been due from a default of profits*, we considered ourselves authorized to act with a *discretionary power*; otherwise, be assured, that we never deviate from orders." This letter was never answered. Now the question for the jury is, under these circumstances, whether this omission of the plaintiffs to make an express declaration, that they would hold the defendants accountable for the breach of orders, and their subsequent silence and delay in bringing the suit, are to be construed as an implied acquiescence in, or ratification of, the acts of the defendants, or a waiver of the claim of the plaintiffs for damages. If so, then the plaintiffs cannot now, upon any after thoughts, reinstate themselves in any right of action. It is a question of fact, and must be decided by the jury upon the whole evidence. They will take into view the subsequent transactions to explain the delay in bringing the suit; and draw their conclusions accordingly. [The Judge here commented on these transactions.]

If the jury shall be of opinion from the whole evidence, that the orders of the plaintiffs have been broken, in not purchasing the tiles, in the manner stated in the declaration, and that there has been no subsequent ratification by the plaintiffs, of the acts and proceedings of the defendants, then the plaintiffs are entitled to recover, and the remaining question is, as to the amount of damages. The counsel for the defendants contend, that the plaintiffs have suffered no damages; that the 2200 pezzos were actually invested in paper on the plaintiffs' account, and were thus received by the plaintiffs at *Leghorn*, and therefore he has lost nothing; and that, at all events, the measure of damages is the value of the 2200 pezzos at *Leghorn*, and not at the *Havana*. My opinion is, that no certain rule of damages can be laid to govern all cases of this nature. The plaintiffs are entitled to recover (if any thing) the real damages sustained by them. What those damages are the jury must decide upon all

the circumstances of the case. In estimating them, they are not bound to confine themselves to the state of things at *Leghorn*, and are not precluded from taking into consideration the nature of the return voyage to the *Havana*, the safe arrival of the *Halcyon* at that port, the state of the markets, and the profits, which might have been made by the plaintiffs, if their orders as to the tiles had been complied with. I can lay down no other rule for the government of the jury than this, that they are at liberty to compensate the plaintiffs for their actual damages sustained as a consequence from the default of the defendants; but they are not at liberty to give vindictive damages. They of course will deduct any benefit derived by the plaintiffs from the investment in paper, as an offset in the damages.

At the close of the case, I have been called upon to give certain directions to the jury, which are so very complicated, that I am not quite sure, that I exactly comprehend them. If I do, they are, with a single exception, embraced in the preceding remarks. That exception is, as to supposed variances between the declaration and the proofs. So far as those variances depend upon the parol proofs in the cause, it is no part of my duty to decide upon them, for they are matters of fact for the consideration of the jury. The question of a variance between a paper declared on, and that offered in proof, is matter of law; but whether the proofs generally in the case support the declaration, especially when there are parol proofs on both sides, is matter of fact for the jury.

It is contended, by the defendants' counsel, that the first new count in the declaration contains a material variance from the written proofs, because that count sets forth the letter of the 15th of September 1824 as containing the special contract between the plaintiffs and the defendants, and as the postscript to that letter contains a material part of the contract, and this postscript is not set forth in that count, as a part of the letter, but is wholly omitted, that the evidence offered by the plaintiffs in this

behalf does not support, and prove the contract, as in that count is alleged. I have not, at this moment, an opportunity to compare the count closely with the letter, and therefore I may mistake its exact import. But as I understand the postscript of the letter, there is no variance, in point of law, between the contract set forth, and the written evidence in the case. The postscript does not change the nature of the contract ; but only shows, that 700 additional pezzos are applicable, as an advance, to the purchase. But the point is rather a matter of fact for the jury upon the whole evidence, and as such I shall leave it to them.

[The Judge then gave his answer to the respective questions propounded by the defendants' counsel.]

Verdict for the plaintiffs, \$3439.24.

After the verdict, a bill of exceptions was tendered to the Court and signed ; and a motion for a new trial was also made by the counsel for the defendants.

On its coming on for argument

STORY J. said,—The motion for a new trial cannot be entertained, according to the practice of the Court, unless the bill of exceptions is waived. The party has his election, either to proceed upon a writ of error to the Supreme Court, in order to have it determined there, whether the points were correctly ruled at the trial ; or waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways. The ground for granting a new trial is, that the party is without other remedy. But that is not the case, where he files a bill of exceptions ; for upon that he can take the opinion of the Supreme Court. It is most convenient for the due administration of justice, that where

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a party means to apply to the appellate court for a final decision of the law of his case, he should so do with the least delay. The other party ought not to be burthened with the expenses of successive trials, until the law of the case is definitively settled by the final tribunal.

Motion overruled.

JOHN BHOLEN AND ANOTHER

vs.

AARON P. CLEVELAND AND ANOTHER.

Where goods, on consignment at *Boston*, were, on the failure of the owners, assigned for the benefit of creditors, and before notice of the assignment could be reasonably given to the consignees, another creditor of the debtor's attached them, by a trustee process, in *Boston*, the debtor and the creditors being citizens of the state of *Pennsylvania*; it was *held*, that the assignment, if *bona fide*, was a sufficient title to pass the goods to the assignees, and would overreach the trustee process.

TROVER for certain cases of merchandise. Plea, not guilty.

At the trial, the facts appeared to be these. The firm of *George & Alexander Holdball*, of *Philadelphia*, consigned the goods in question to the defendants at *Boston*, and afterwards, on the 5th of April 1825, failed, and assigned their property, including these goods, to the plaintiffs, who were their creditors, for the benefit of their creditors generally. At the time of their failure, they were indebted to *John Evans* of *Philadelphia*; and, on the same day on which the assignment was made in *Philadelphia*, *Evans* wrote a letter to *Boston* directing a suit for his debt, against the defendants, as trustees of *G. & A. Holdball*. On the 9th of April 1825, on the arrival of the mail and the receipt of this letter, a process issued accordingly from the State Court, and the defendants were sued as trustees. The plaintiffs, as soon as they

reasonably could afterwards, made a demand upon the defendants for the same goods, offering to pay them their commissions and charges. The defendants refused to deliver them. The trustee process is still pending in the State Court. The question was, whether, under these circumstances, the plaintiffs were entitled to recover.

The cause was shortly argued by *Webster* for the plaintiffs, and by *Sewall* and *Aylwin* for the defendants.

STORY J. The whole controversy turns upon this single point, whose was the property in these goods at the time when the trustee process was served? It is to be recollected, that this is the case of a general assignment made in *Philadelphia*, and the plaintiffs, as well as *Evans*, are citizens of the state of *Pennsylvania*. Their rights are, therefore, to be judged of by the laws of that state. It is not denied, that general assignments of this nature in favour of creditors, if *bonâ fide*, are valid, by the laws of that state, to pass the property contained therein. It is not denied, that the present assignment is *bonâ fide* and valid in its execution. The question is, whether it was legally sufficient to convey goods locally situated in *Boston*. As against the assignor himself, there can be no doubt. No immediate delivery was practicable; nor is it necessary in cases, where goods are not at the time within the reach of the parties. It is sufficient, if the assignees perfect their title to the goods, within a reasonable time afterwards, by a notice of their title and demand of the goods, or obtaining an actual delivery. After the assignment, the consignees held the goods for the benefit of the persons, who had the legal title thereto. The assignment worked an immediate transfer of the ownership.

If the law be so, as against the assignor, how can his creditor, *Evans*, be in a better situation? At the time of the service of the trustee process, the goods were no longer the property of the *Holdballs*. They had transferred them to the plaintiffs. It was not a race of diligence, where the first, who could attach them,

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would hold them. Nothing could be attached under the trustee process but the property of the *Holdballs*. It is not true, as the argument supposes, that no property in the goods passed to the plaintiffs, until they perfected their title by a notice and demand. Their title to the goods was complete by the execution of the assignment, subject to be defeated by their laches in not giving reasonable notice, or in not following up their title to possession. And, if the title were merely inchoate, still by the notice within a reasonable time, it became, by relation, good from the beginning. An inchoate title of this sort, would not be defeated by an intermediate attachment, unless there were laches.

Several years ago, the same question came before me, in a case in *Rhode Island*; and it was then ruled, as it is now ruled. That judgment was acquiesced in. If the defendants' counsel think me wrong, they can file a bill of exceptions to this opinion, and carry the cause to the Supreme Court for a final decision.

Verdict for the plaintiffs.

UNITED STATES BANK vs. AMOS BINNEY AND OTHERS.

Where a partnership is carried on by a firm in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted, as notes binding the firm, upon a representation to that effect of the partner giving the same, and were made for the common benefit and business of the firm.

Secret partnership means, "in common usage, a partnership where some of the partners are kept *secret*, or are unknown, in contradistinction to open or notorious partnership. Where one partner publicly avows all the partners, so that they become and are known as such, and credit is obtained thereby, it is no longer a *secret* partnership, whether the firm be carried on in the name of one partner only or otherwise.

The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances, which lead to a contrary presumption.

United States Bank *vs.* Amos Binney *et al.*

One partner can bind the other only for objects within the scope of the business of the firm. *Secret* restrictions of the rights of partners do not affect those persons, who deal with the firm in ignorance of them.

THIS was an action of assumpsit, brought by the *United States Branch Bank*, at *Boston*, against *Amos Binney*, *John Binney*, and *John Winship*, upon certain promissory notes, made by one *Samuel Jaques jr.*, and indorsed by said *Winship*, which had been discounted at the bank, and protested for non-payment.

The plaintiffs claimed to recover the amount of these notes of the defendants, upon the ground, that they were in partnership together under the firm of *John Winship*; and these notes were indorsed by *Winship* on behalf of the firm, and the money applied to the use of the firm.

Jaques, who was called as a witness by the plaintiffs, testified, that he knew, by general reputation, of the existence of a partnership between the defendants in the soap and candle business, but had never seen any articles of agreement between them; that it was generally understood, that they were co-partners; that he and *Winship* both lived in *Charlestown*, and saw each other every day; and that *Winship* did no other business to his knowledge, than that connected with this concern; that he had dealings with *Winship* soon after the commencement of the partnership, and supplied him with rosin to the amount of \$400 or \$500 per year; that *Winship* sometimes gave a note for the balance, signed "*John Winship*," and that witness always took such notes on the credit of the *Binneys*, with full confidence, that they were interested, and were men of property; that from some time in the year 1823 until the year 1825, witness and *Winship* were in the habit of exchanging notes, which were discounted at the different banks in *Boston*, sometimes signed by one and indorsed by the other, and *vice versa*; that *Winship* usually applied for the discounts, and that witness indorsed these notes on the credit of the firm; that *Winship* always represented them to be for the partnership account, and that witness never

understood, that they were on his private account ; that the notes in suit were generally presented by *Winship* for discount, but that witness might have presented some of them ; that there were some notes for witness's private account, but that he believed those in suit to have been for the firm ; that he could not state, what portion of the money obtained on those notes he had received, but that as he and *Winship* exchanged notes, he could not say, that he never received any of it ; that some of these notes were given for renewals at this bank, and some to take up notes at other banks ; that it was his impression, that some of the money, thus obtained, went to pay for rosin, and that one of the notes for \$1500 was originally made to take up a note, which had been previously given at the Manufacturers and Mechanics bank for rosin, that being a material used in defendants' factory ; that he knew no particulars concerning the appropriation of the monies obtained upon these notes, and knew of no other, which *Winship* could have made, but for the use of the firm ; that the business of the firm required a great capital, and that *Winship* often spoke of buying barilla and tallow for defendants' factory ; but witness did not know he alluded to these particular notes, nor that the proceeds of them were applied to any other business ; that *Winship* sometimes came to witness and stated, that he wanted witness's name instead of *Amos Binney's*, because Mr. *Binney* was absent, and that witness gave his name ; that this business of exchanging notes continued until 1825, when witness and *Winship* stopped payment ; that the particular occasion of witness's stopping payment was, the non-payment of his acceptance on a draft drawn on him by *Winship* for barilla ; that witness told Mr. *Amos Binney* of it, who said he would do nothing about it ; that witness furnished the factory of defendants with rosin from 1822 to 1825, and generally received payment in notes ; that he had endeavored to trace the origin of the notes in suit, but could trace only two of them, one of \$800 and one of \$806 ; that no particular agreement ever subsisted between

witness and *Winship* concerning the proceeds of their accommodation notes ; that they sometimes divided the money and each took a portion ; that he never knew any actual use, for the benefit of the firm, of the money obtained on the accommodation notes, unless the taking up of the rosin notes should be so considered ; that he understood, that *Winship* was engaged in some shipments of the manufactures of the firm, and also of some other articles, but always supposed them to be on account of the firm, and that *Winship* always told him they were ; that witness was called upon to take up one of these accommodation notes signed by him, and borrowed money of *Amos Binney* upon collateral security for that purpose, and that nothing was said to *Binney* about his being liable to pay the note, as the witness recollected.

Charles Harris, the discount clerk of the plaintiffs, testified, that the notes in suit were all discounted at *Winship's* request, and the proceeds passed to his credit ; that he considered them to be accommodation notes ; that the bank had frequently discounted notes signed by *Winship*, and indorsed by *Amos Binney*.

Abel Adams testified, that he understood from report, that the *Binneys* and *Winship* were concerned together ; that when *Winship* failed, he owed witness from \$20,000 to \$30,000, for which he had security in bills of lading, policies of insurance, &c. assigned to him by *Winship* by deed ; and that after satisfying his demands, witness assigned over the surplus to *Amos Binney* ; that the property so assigned to witness was abroad in vessels chartered by *Winship*.

John Skinner, partner of *Adams*, testified, that he knew by common report of the copartnership between the defendants, and considered, that all his transactions with *Winship* bound the *Binneys* ; that witness once inquired of *Winship*, in the early part of the season in which they failed, as to the existence of the firm ; that *Winship* stated it, and offered to show the articles of agreement ; that it was generally understood, that there was such a copartnership ; that witness did not know what sort of copart-

nership it was, but knew of no other business than the soap and candle business, until the return of some shipments, which *Winship* had made in 1825 ; that it was not known that *Winship* had any other business, in which the *Binneys* were not concerned.

Daniel P. Parker, who was a director in the bank at the time these notes were discounted, and who made himself a witness by disposing of his shares, testified, that it was understood by the directors, when they discounted these notes, that the *Binneys* were bound by them. Witness understood, that they were partners in the soap and candle business ; that a number of notes of this kind were discounted, while other notes, endorsed by *Amos Binney*, were in the bank.

Several other witnesses were produced by the plaintiffs, who testified, that it was generally understood, that a copartnership existed between the defendants. The deposition of *Charles Hood*, cashier of another bank, in said *Boston*, was also read, going to prove, that notes similar to those in suit, had been discounted for *Winship* at that bank.

The defendants, on their part, produced the original agreement between themselves, dated September 25, 1817, whereby, the *Binneys* agreed to furnish a capital of \$20,000, for the purpose of manufacturing soap and candles ; and *Winship* agreed to give his whole time and attention to the superintendence of the business, the *Binneys* to have half the profits and *Winship* the other half. They also produced a bond of the same date given by *Winship* to *Amos Binney* in the penal sum of \$10,000, whereby, in consideration of *Amos Binney's* engagement to indorse his notes for the purchase of stock and raw materials for the purposes of this business, he binds himself not to endorse the notes or paper of, or become in any manner responsible as surety for, any person or persons, other than the said *Amos Binney*, for the term of two years from the 1st of October 1817.

They also produced *John S. Tyler*, who was the clerk and agent of *Amos Binney* at the time of *Winship's* failure. He tes-

tified, that soon after the failure of *Winship*, all the books and papers were put into his hands; that he examined the books thoroughly, and found no entries of any of the notes in suit, and none of any of which they are stated to be renewals, excepting the two notes of \$300 and \$806; that the regular business notes of the firm appeared to have been regularly entered in the books, and the payment of them entered in the cash book, but that no such entries appeared to have been made of these accommodation notes; that there were entries of notes signed by *Winship*, and indorsed by the other defendants severally, to a large amount; that the amount sunk and lost to the *Binneys* was about \$70,000; and that *Winship* had made annual statements representing the business to be profitable; that in April 1825, not long before the failure of *Winship*, the invoices of two shipments, one by the brigantine *Susan*, and one by the *Paul Jones*, of beef, pork, lard, &c. were entered in the invoice book of the concern, but that no other entries appeared to have been made of any shipments, excepting of articles manufactured by the firm, and that the outfits in them were about \$6000 or \$7000 each.

William Parmenter testified, that he was clerk of the *Binneys* from 1814 to 1824, and did not know of any business transacted by *Winship* out of the course of the copartnership business, and never heard of any of the accommodation notes.

Several other witnesses were introduced by the defendants, who testified, that in as far as they had heard of the copartnership between the defendants, they had heard that it was limited to the manufacture of soap and candles. The foreman in the manufactory also testified, that he kept the books of the concern, and that during the whole time, he never saw *John Binney* in the counting room, nor *Amos* more than once or twice before the failure of *Winship*; that he had carried on the business since the failure, and it had been profitable.

Loring and *Hubbard*, for the defendants, contended, that the copartnership between the defendants was, in contemplation of

law, a secret copartnership, and did not authorize the giving of credit to any other name than that of *Winship*. That the jury had a right to infer, from the evidence, notwithstanding the entries of the said shipments in the invoice book kept by *Winship*, that the *Binneys* had no knowledge thereof, and could not, therefore, be presumed to have adopted or ratified the conduct of said *Winship* in making said shipments. That by the tenor of the said recited articles of agreement and bond, the said *Winship* had no right or authority to raise money on the credit of the firm, or to bind the firm by his signature for the purpose of borrowing money. And they moved the Court to instruct the jury, that if, upon the whole evidence, they were satisfied, that the copartnership, proved to have existed between the defendants under the name of *John Winship*, was known or understood by the plaintiffs to be limited to the manufactory of soap and candles, they must find a verdict for the defendants, unless they were also satisfied, that these notes were given in the ordinary course of the copartnership business, or that the monies obtained upon them went directly to the use of the firm with the consent of the *Binneys*; and that if they were satisfied, that any part of those monies did go to the use of the firm with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue.

Secondly :—That if they were also satisfied, that the Messrs. *Binneys* furnished *Winship* with sufficient capital and credit for carrying on the business of the firm, no such consent could be implied from the mere fact, that *Winship* applied those monies, or any part of them, to the payment of partnership debts.

Blair, Blake, and Webster for the plaintiffs.

STORY J., in summing-up the facts, stated his opinion as follows :—The present suit is brought by the *Bank of the United States*, as holders of certain promissory notes, signed by *Samuel Jaques jr.*, and indorsed by *John Winship*, which have been dis-

counted at that bank, and protested for non-payment. The plaintiffs found their claim against the defendants upon the statement, that the defendants are partners in trade under the name and firm of "*John Winship*;" that the indorsement and discount were for the benefit of the firm, and that upon the dishonour of the notes, they are all jointly liable as partners. No question arises as to the due presentment of the notes for payment, and due notice of the dishonour to the defendants. The defence turns upon a point wholly distinct from that. The defendants admit, that they were partners in the soap and candle business with *John Winship*, in the manner, and to the extent set forth in the articles of copartnership read at the bar, and that the business was carried on in the name of "*John Winship*;" but they deny, that *Winship* was authorized to make or indorse any such notes, or to bind the partnership thereby; or that they were ever offered for discount, or discounted on account of the partnership, or the proceeds ever were applied to their use or benefit.

In respect to the general law regulating partnerships, there does not seem any real dispute or difficulty. Partnerships are usually divided into two sorts, general and limited. The former is, where the parties are partners in all their commercial business; the latter, where it is limited to some one or more branches, and does not include all the business of the partners. There is, probably, no such thing as a universal partnership, if, by the terms, we are to understand, that every thing done, bought, or sold, is to be deemed on partnership account. Most men own some real or personal estate, which they manage exclusively for themselves.

In respect to both general and limited partnerships, the same general principle applies, that each partner has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will, *prima facie*, bind the firm, unless it is *ultra* the business of the firm. Where the firm imports, on its face, a compa-

ny, as *A. B. & Co.*, or *A, B, & C.*, there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs must go farther, and show, that it is a partnership signature. In the present case, the signature of "*John Winship*" may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish, that it is a contract of the firm, and ought to bind them.

The case of *Livingston vs. Roosevelt*, (4 *Johns. R.* 251,) has been relied upon by the defendants' counsel, as containing the true doctrines of law, applicable to general and limited partnerships. I am not disposed to controvert it. These doctrines may be taken by the jury as correct; and I will quote the language, as it stands in the report, so as to direct the attention of the jury to it. [Here the judge read from the report.] In this case, it is stated, that partners, in limited as well as in general partnerships, are authorized to raise and borrow money, sign and indorse notes and bills for the common benefit, in transactions relating to the business of the firm. This doctrine has not been controverted at the bar; and indeed it must be true, if such be the ordinary course and usage of trade; for then such an authority must be presumed to be allowed by all the partners for the common benefit. And I know of no principle established to the contrary.

Whether the present be a limited or general partnership is to be determined by the whole evidence in the case. It is certain, that by the articles it is a limited copartnership, and confined to the soap and candle business. Those articles expired, by their own limitation, in two years, and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that as the partnership was continued in fact, it was continued on the same terms, as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the copartnership, and therefore it is open for inquiry upon all the evidence. The present notes were made and indorsed long after the term of two years expired. The plaintiffs contend, that the partnership was then general; the defendants, that it was limited, as before. The jury must determine between them, upon weighing all the facts and presumptions.

It has been said, that this is the case of a *secret* partnership; that it was the intention of the *Binneys*, that their connexion with it should be kept secret, and that the management of the business in the name of "*John Winship*" shows this intention. In point of fact, there is no covenant or declaration in the articles of copartnership, by which the parties have bound themselves to keep it secret; or that the names of the *Binneys* should never be disclosed to any persons dealing with *Winship* in the partnership concerns. In point of fact, too, if the evidence is believed, *Winship*, immediately after its formation, and during its continuance, constantly avowed it, and made it known, and obtained credit in the business of the firm thereby. He stated the *Binneys* to be partners; and this statement was generally known and believed by the public, and especially by persons dealing with *Winship* in respect to the business of the firm. If the jury believe this evidence, then in point of fact, whatever was the original intention of the parties, this was not a *secret* partnership in

the common meaning of the terms. I understand the common meaning of *secret* partnership to be, a partnership, where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where all the partners are publicly made known, whether it be by one, or all the partners, it is no longer a *secret* partnership, for this is generally used in contradistinction to *notorious*, and *open* partnership. And it makes no difference in this particular, whether the business of the firm be carried on in the name of one person only, or of him and company. Even if some of the partners intend to be such *secretly*, and their names are disclosed against their wishes and intentions; still when generally known and avowed by any other of the partners, the partnership is no longer a *secret* partnership. If, therefore, in the present case, *Winship*, against the wishes and intention of the *Binneys*, did in the course of the business of the firm make known, that they were partners, and who all the partners were, so that they became public and notorious, I should say, it was no longer a *secret* partnership in the common sense of the terms; if *secret* in any sense, it must be, under such circumstances, in a peculiar sense. Sometimes dormant and *secret* partners are used as synonymous; but I take it, that dormant is generally used, in contradistinction to active; and *secret*, to open or notorious. However, nothing important turns in this case upon the accuracy of definitions, since it must be decided upon the principles of law applicable to such a partnership as this in fact was, and is proved to be, whatever may be its denomination.

In the present case, *Winship* was entrusted with the whole business of the firm, as the active partner, and it was to be managed in his name. The business was the manufactory of soap and candles. The particular terms and restrictions of the articles of copartnership were not, as far as we have any evidence, ever made known to the public, or to any persons dealing therewith. Indeed, according to the very line of argument of the de-

pendant's counsel they were intended to be kept secret. I agree, that the bond is to be taken in connexion with the articles of co-partnership, as a part of the same transaction, and binding the parties. But if neither the bond, nor articles, nor any conditions or limitations, or restrictions therein contained were ever made known to the public, then persons, ignorant thereof, and dealing with *Winship* in respect to the business of the firm, and trusting him on the credit of the firm with money, or goods, or receiving his notes in payment, had a right to act upon the general principles of law applicable to limited partnerships; and the acts of *Winship*, in respect to such persons, under such circumstances bound the firm. *Winship* must be deemed, as to them, to have the ordinary authority to bind the firm to the same extent, and in the same manner, as partners, as the active partners in limited partnerships of a like nature possess.

If, indeed, the jury should come to the conclusion, that the partnership was ultimately general, or that the *Binneys* knew, that *Winship* held them out as his partners generally in all transactions of a commercial nature; or that they knew, that he obtained credit for the firm upon such representations of their joint responsibility; and that these notes were discounted upon such representations, so known to them, and not disavowed or contradicted by them, then the case might justify a broader doctrine. For, under such circumstances, their silence might be fairly construed as a confirmation of his acts; and they ought, in conscience and equity, as well as in law, to bind them. It would be for the jury to consider, how far the evidence would bear out such a conclusion.

But supposing the partnership to be limited to the soap and candle manufacture, still if credit is given to the firm within the business of the firm, it binds all the partners, notwithstanding any secret reservations between the latter, which are unknown to those, who give the credit. If credit be given to the firm, within the scope of the business of the firm, no subsequent misapplica-

tion of the fund by the partner procuring it, to which the creditor is not privy or party, will exonerate the firm. Even in respect to secret partnerships, where the credit is given only to the ostensible party ; yet if it be in the course of the business of the partnership, and for the common benefit, the secret and silent partners are bound ; for those, who are to receive the benefit, are also bound to the burthens. If, therefore, *Winship* borrowed money on the credit of the firm, and applied it to the use of the firm, and the creditor was wholly ignorant of any restrictions contained in the private agreements of the partners, by which it was not necessary for the business of the firm, the firm would be bound, notwithstanding *Winship* might, in fact, have had at the time other sufficient funds in his hands. It would doubtless be different, if there was any fraudulent connivance between the parties, or a misapplication of the fund, to which the creditor was a party or privy. It is upon this ground, that one partner cannot pay his own separate debt by any contract or payment knowingly made to bind the firm, and which is not authorized by the firm.

It has been said, that no conclusion could be drawn unfavourable to the *Binneys* from any entries contained in the books of the firm, as to their sanction of the proceedings of *Winship*. That would depend upon their knowledge of those entries. Whether they had such knowledge is matter of fact, upon the whole evidence in the case. The ordinary presumption is in cases of partnership, that all the partners have access to the partnership books, and might know the contents thereof. But this is a mere presumption from the ordinary course of business, and may be rebutted by any circumstances, which either positively or presumptively rebut any inference of access, such, for instance, as distance of place, or the course of business of the particular partnership ; and indeed any other circumstances raising a presumption of non-access.

In the present case the material considerations, then, are these. If *Winship* was the active partner, and authorized to con-

duct the business of the firm ; and if the particular terms and restrictions of the articles of copartnership were secret and unknown to persons dealing with him on account of the firm ; he possessed, so far as respected such persons, the ordinary powers of partners in like cases of limited partnerships. It has not been denied, that these include, (as the case in 4 *Johns. R.* 251, shows,) a power to borrow money, and for this purpose, to sign and indorse notes and bills in the name of the firm for the business thereof, and to procure discounts thereof. Were these notes of that nature, and the discount thereof procured for the benefit and upon the credit of the firm in the course of its business, without any knowledge on the part of the bank, that *Winship* had no right under the circumstances to bind the firm therefor ? If so, then the plaintiffs are entitled to recover, although *Winship* may have subsequently misapplied the funds so procured by such discounts, unless the plaintiffs were privy or party to such misapplication.

The notes are all indorsed in the name of "*John Winship.*" For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go farther, and show either expressly or by implication, that these notes were offered by *Winship* as notes binding the firm, and not merely himself personally, or that the discounts were made for the benefit, and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove, that the bank, in discounting these notes, acted upon the *belief*, that they bound the firm, and were for the benefit and business of the firm. They must go further and prove, that that belief was known to and sanctioned by *Winship* himself in offering the notes, and that he intentionally held out to them, that the discounts were for the credit, and on the account of the firm ; and that his indorsement was the indorsement of the firm, and to bind them ; and that the bank discounted the notes upon the faith of such acts and representations of *Winship*. The jury will judge from

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the whole evidence, how the case stands in these respects. The mere fact, that the discounts so procured were applied to the use of the firm, is not, of itself, sufficient to prove, that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight; but not decisive.

Another point made by the plaintiffs is, that the *Binneys* have subsequently ratified *Winship's* conduct, by procuring discounts of a like nature, so as to establish either an original authority in *Winship* to make such indorsements, and procure such discounts, or at least a ratification, which is equivalent to such an authority.

[The Judge then summed up the facts on this as well as the other points, and left the case to the jury.]

Verdict for the plaintiffs.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1828, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN PITMAN, District Judge.

STEPHEN H. SMITH vs. WILLIAM MILLER.

A lease for 500 years of certain land covered with a pond of water conveys, as incident, the water and the fish therein.

TRESPASS for entering the plaintiff's close, partly covered with water, and taking fish from his pond. Plea, the general issue.

At the trial, the principal question was, whether the plaintiff had any property in the fish. The title of the plaintiff was under a lease for 500 years of a certain factory lot, and dam lot, in &c., "together with all the land, which may be flowed by raising said dam seven feet high from the bed or bottom of the river."

The cause was shortly argued by *Searle* for the plaintiff, and by *Bridgham* for the defendant.

THE COURT said :—The lease having conveyed all the land under the pond, it passed the pond of water and the fish therein to the plaintiff, as incidents to the principal grant.

Verdict for the plaintiff.

UNITED STATES vs. SPENCER RUGGLES.

Under the 10th section of the act of 1825, ch. 67, [276] the forcing a mariner on shore must be done, not only without justifiable cause, but also maliciously, to justify a conviction. If done under a mistaken sense of duty, it is not a case for conviction.

"Maliciously" in the statute means, with a wilful disregard of right and duty, or doing the act against a man's own conviction of duty.

A master of a ship has authority to confine his seamen in a common gaol, in a foreign port, for offences and misconduct, in extreme cases, and where the proper correction or punishment cannot be effectual on shipboard.

INDICTMENT for maliciously forcing a mariner on shore in a foreign port, contrary to the tenth section of the act of 1825, ch. 67, [276]. Plea, not guilty.

The cause turned principally on matters of fact at the trial; and it was argued by *Pratt* and *Searle* for the defendant, and by *Greene* (District Attorney) for the *United States*. Upon the summing up to the jury, the following opinion was delivered, as to the construction of the statute.

STORY J. The words of the act of Congress are, that "if any master, &c. shall, during his being abroad, maliciously and without any justifiable cause, force any officer or mariner of such ship, &c. on shore, &c. he shall, on conviction thereof, be punished by fine, &c." To constitute the offence, both facts must concur. It is not sufficient, that there is no justifiable cause for the act; it must also be maliciously done. If therefore the jury should come to the conclusion, that there has been no justifiable cause, still they must be satisfied further, that the act has been maliciously done by the defendant. By "maliciously," in the intendment of the statute, is not merely meant a wicked, malignant, and revengeful act, such as in cases of murder constitutes malice, and which flows from a heart regardless of social duty, and fatally bent on mischief. But if the act be wantonly done, that is, with a wilful disregard of right or duty, it is, in the sense

of the statute, malicious. It must be a wilful act, done contrary to a man's own convictions of duty. If, therefore, the defendant did the act from good motives, and under a mistaken sense of duty, and not from a spirit of hatred, or with an intention to oppress, then he ought to be acquitted, notwithstanding the want of justifiable cause. But if he did the act contrary to his own sense of duty, as a mere exercise of power, without any sense of its being right, then it was "maliciously" done in the sense of the statute.¹

There is another point, on which the Court is called to express an opinion. In the present case, the master not only forced the seamen on shore, but he caused them to be confined and imprisoned in the common gaol at *St. Pierre's*, under circumstances of such great exposure and severity, as cannot be justified. It is said, that the law does not clothe the master with any authority to imprison the seamen for disobedience or misconduct in a common gaol in a foreign port; and that the imprisonment, if necessary or proper, must be on board of the ship. I am aware, that it has been doubted by very able judges, whether the law does authorize such an imprisonment on shore in a foreign port. My opinion, however, upon the most mature deliberation, is, that it does authorize it; but I am also of opinion, that the authority arises, and can be exercised only in cases of flagrant offences, where there is a positive necessity of removal of the party offending from the ship to some place of safety on shore. The authority is of a very delicate and summary nature, and is justified only by the same necessities, which clothe private persons in other cases with extraordinary powers. Cases may easily be conceived, where the authority may be indispensable for the safe-

¹ See *Harman vs. Tappenden*, 1 *East's Reports*, 554, 563, and note, *ibid.* and 564, 565, as to the meaning of "maliciously."—See also 2 *Starkie on Evid. Titles, Libel and Malice*, p. 862, p. 891, &c.—*Robertson vs. Mc Dougall*, 4 *Bing. R.* 670, 680.—*Looker vs. Halcomb*, 4 *Bing. R.* 183, 190, as to the meaning of "wilfully and maliciously" in *Stat. 1 Geo. 4, ch. 56*.

ty of the ship, cargo, and crew. Suppose a mutiny in port, with an intent to murder the officers, or to embezzle the cargo ; and the conspiracy be so extensive, that the mutineers cannot be suffered to remain on board, but at the imminent hazard of the lives of the officers, and the property on board. The master must have (as I think) a right, under such circumstances, to remove them from the ship ; and to imprison them, as well for punishment as safety, if he does not choose (as he may) to dismiss them altogether from the employment. But in such a case, the imprisonment must be with the intent to take them again on board the ship for the voyage, or to bring them home ; and not with the intent merely to punish them, and at the same time to dissolve their connexion with the ship. The master can punish only to promote good discipline, and compel obedience to lawful orders on board of the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offences. The law has conceded that authority to the regular tribunals of the country, acting in the common forms of justice, and upon a trial of the facts by a jury. While, therefore, I admit, that a master may, in extreme cases, imprison a seaman in a common gaol in a foreign port, (for no such authority is pretended to exist in a domestic port,) I think the authority is confined to extreme cases ; and cannot be justified, when a more moderate punishment on ship-board would be effectual and safe. The notion, so commonly entertained, that a master may, at his pleasure, for slight offences imprison his seamen in a foreign gaol, is utterly unfounded in law. It is well known, that there is in warm climates great danger to the healths and lives of seamen in these miserable and loathsome places ; and a power to imprison them there is often a power of life or death. It is high time, that masters should understand, that they are criminally liable for such wanton abuses of authority. And if a seamen should lose his life by confinement and exposure in such a gaol through the instrumentality of the master, without justifiable cause, the

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master is responsible, as in other cases of homicide. One of the strongest reasons against the exercise of the authority is, that the seamen are thus put utterly out of the control and supervision of the master. It is his duty to watch over them with parental attention, as long as they belong to the ship ; and he has no right to delegate his authority or custody to gaolers and turnkeys in a foreign country.

Verdict, guilty.

THOMAS LYMAN vs. JAMES ARNOLD AND OTHERS.

A liberty granted in a deed "to dig a canal through the grantor's land," does not include, as an incident, the proprietary interest in the soil, when dug up and removed.

BILL in equity, for an injunction to prevent a removal and sale of certain stones dug out of a canal, and also for relief. The cause came on to be heard upon the bill answers and depositions, and was argued by *J. L. Tillinghast* for the plaintiff, and by *Whipple* and *Searle* for the defendants.

STORY J. The present suit is a bill in equity brought for an injunction and relief, on account of an asserted claim by the defendants of a right to take, remove, and sell, certain stones and other materials dug out of a canal, which the plaintiff has constructed through the land of the defendants, under an agreement for that purpose. The plaintiff alleges, that these stones and materials are his own property, and that a sale has been made of a part of them by the defendants ; and as to the residue, which are still on the land of the defendants, and on which they were rightfully placed, they have obstructed the plaintiff in the removal and use of them, &c. The title of the plaintiff is set forth in various

ways in the bill. In the first place, it is derived, as an incident to a written grant ; in the next place, from a parol grant, or contract ; and in the last place, from the acquiescence of the defendants, which, under the circumstances of the case, has operated as a constructive fraud upon him by inducing him to make the canal, and incur heavy expenses, on the faith of a full right to such stone and materials. I lay out of the case all consideration of the two last heads of title, because they are expressly denied in the answers, and there is no sufficient proofs to support them against such denials.

The whole question, therefore, resolves itself into the first head ; and to the consideration of that the attention of the Court will be exclusively addressed.

On the 12th of May 1814, *James Arnold*, (one of the defendants,) by his deed of that date, conveyed to *Daniel Lyman* and *Samuel G. Arnold* (under one of whom the plaintiff claims title) a certain tract or parcel of land in *Cumberland*, in *Rhode Island*, the boundaries whereof are mentioned in the deed, together with one half of the water in *Pawtucket river* at *Woonsocket Falls*, at the dam there erected on said river, with liberty to dig a canal *through the grantor's land*, and across the road from the canal, in which the grantor then took out the water from his pond into the trench on the easterly side of the road, to the northward of the grantor's old machine shop, doing no injury to the grantor's buildings, and from thence to the land by the said deed conveyed, but no deeper than the canal already dug by the grantor, with liberty, *at the expense of the grantees*, to widen the grantor's canal, as far as might be necessary for the full improvement of the privilege by said deed conveyed, without injury to the grantor, and without deepening his canal ; and the said canal not to be deepened by either party without the consent of the other ; the grantees sufficiently and substantially, at their own expense, to cover the canal to be dug by them from the grantor's canal to said trench, and forever thereafter to be at the one

moiety or half part of the expense of repairing, supporting, and rebuilding the dam across the river : To have and to hold the same premises to the said *Daniel Lyman*, and *Samuel G. Arnold*, their heirs and assigns, with all the appurtenances, privileges, and commodities, to the same belonging, or in any wise appertaining.

Such are the substantial clauses in the deed. The stones and other materials now in controversy were dug out of the canal thus authorized through the grantor's land. It is material to state, that they are not now claimed by the plaintiff, as necessary or proper, or even desirable for the purpose of constructing, or securing, or embanking the canal. But the claim is, that the grant above recited contains a good conveyance of all the soil, stones, and materials so dug up in the course of that canal, exclusively to the use of the grantees, and that the defendants or any of them have no right to intermeddle therewith. In short, the claim is of an exclusive property by grant to all the stones, soil, and materials throughout the whole extent of the canal, in the grantor's land, and to the length, breadth, and depth, which it is authorized to be dug.

I give no opinion, what would be the result, if the title now set up to these materials were merely to the use of them, for the purpose of constructing, securing, or embanking the canal, or indeed for any other purpose connected with its existence or necessary use. That point does not arise upon these pleadings, and is not involved in the present discussion. The question is, whether the *absolute property* in these materials passed by this grant to the original grantees in the deed.

In the construction of grants, that is doubtless to be adopted, which gives entire and liberal effect to the intention of the parties. When the object is distinctly seen, the ordinary means, by which it is to be attained, are presumed to be within the purview of the parties. If the use of a thing is granted, whatever is necessary for the enjoyment of such use, or for the attainment of such use,

is, by implication, granted also.¹ But if it be not necessary, but may be a convenience only, it is not granted.² So, too, grants are to be construed according to the subject matter, and the natural presumptions arising from their terms, and thus to render them expositions of rational intentions. If a contract is made allowing a person to dig coals or turf in another's land, the law presumes, that the coal or turf is to belong to the grantee. So, if a license is given to one to work another's mine, the presumption is, that he is to have the produce of his labour. The reason of such an interpretation of the contract is, that the grant is supposed to be intended for the benefit of the grantee, and to give him a substantive interest, and not to impose a burthen. If he had no interest in the thing for the labour bestowed upon it, he could have no recompense, and the grant, as such, would be utterly worthless and nugatory. But if a grant were to dig in another's soil, and lay a drain or pipes, it would not be so clear, that the grant included the property of the removed soil.³ It would not be necessary to the fair enjoyment of the privilege. And *Plowden* (*Comm.* 16 a) instructs us, that if it would be a mere convenience to the party, it would not pass as an incident, unless it were also necessary. The case put at the bar affords another strong illustration of the true principle. If a grant is made of a way over another's land within particular boundaries, that may include the right to dig up and level the soil, or even to remove parts, so as to make the way passable; and to use the soil for this purpose; but all this would be perfectly consistent with the right of the soil remaining in the original proprietor. Where a highway is made over another's land, the soil still remains in the owner, subject to the easement.⁴ If there are trees on it, they

¹ *Co. Litt.* 56 a.—*Shep. Touch.* 90.—*Saunders's Case*, 5 *Co. R.* 12.—
³ *Bac. Abridg. Grant*, l. 5.—*Perkins' Grant*, 116, 111, 112.

² *Plowden*, 16 a.—*Com. Dig. Grant*, E. 11.

³ See *Pomfret vs. Ricroft*, 1 *Saund. R.* 321, 322, and note b.

⁴ See *Jackson vs. Hathaway*, 15 *Johns. R.* 447.—*Perley vs. Chandler*

are his. If it be necessary to cut them down and remove them, in order make the highway, still the property of the trees, so cut down, is unchanged. The reason is, that nothing is deemed included to pass, as an incident to an easement, but what is necessary to its reasonable enjoyment. The change of property in such trees is not necessary to such enjoyment. The case of *Lord Darcy vs. Askwith*, (*Hob. R.* 234,) affords an illustration of this doctrine. There the lease was of certain coal mines, and the lessee cut down trees for the use of the coal mines; and being sued in waste, he pleaded, that he cut them down, and used them for the making of puncheons, corses, and other utensils in and about the coal mines, without which they could not dig, and get the coals out of the pits, and he did bestow them accordingly. On demurrer, the Court held the plea bad, because, though a grant of a thing did carry all things included, without which the thing granted could not be had; yet that must be understood of things incident, and *directly necessary*. Another illustration is in *Harrison vs. Parker*, (*6 East R.* 154,) where it was held, that if a party builds a bridge, and dedicates it to the public, he still retains his proprietary interest in the materials, and as soon as they cease to be used as a part of the bridge, he is entitled to recover them. *Saunders's case* (*5 Co. R.* 12) is not at all at variance with these principles. In that case, there was a lease of certain lands, on which there was an open mine. The lease conveyed the same land with all the *profits &c.*; and it was held no waste to work the open mine; and the reason was, that, being an open mine, the intention of the parties must be presumed to be to grant all those things, which might be used in the then state as profits of the land. The mere fact, that a person having a grant of a privilege, servitude, or easement, in the land of another, bestows his labour upon the soil, or separates it, and gives it value thereby, constitutes no sufficient ground to infer

6 *Mass. R.* 454.—*Stackpole vs. Healy*, 16 *Mass. R.* 33.—*Robbins vs. Borman*, 1 *Pick. R.* 122.

a change of property in the soil ; for such labour is bestowed in order to enjoy such privilege, servitude, or easement.

In order to decide, therefore, what is contained in the grant in the present case, it is material to consider the terms of the deed, and the apparent object of the parties. The object of the parties is to grant the right to make a canal at the expense, and for the use and benefit of the grantees across the grantor's land. This is plainly to be inferred from the very terms of the deed. The words are, "with liberty to dig a canal through the grantor's land," and it is afterwards spoken of as a "privilege." A reasonable interpretation of this language must be, that the liberty to dig the canal includes the right to use it, when dug ; for without such right, there could be no improvement of the privilege, or any benefit to the grantees. The principal right, franchise, easement, or servitude, call it which you may, is the canal, and the liberty to dig up the soil for this purpose would have followed, as an incident, even if it had not been expressly given. There is not one word in the deed, which purports to grant any right in the soil itself, either before or after its removal. In this respect, there is a total silence. How then is it to be inferred ? If at all, it must be, because such a right to the soil flows as a necessary incident to the express grant. Now the "liberty to dig a canal" does not necessarily require, that the soil dug up should pass to the grantee ; for there may be the most perfect enjoyment of that liberty without it. If the soil is separated and removed, and the canal is dug, it is wholly immaterial to the exercise of that right, what afterwards becomes of it. Suppose the fact to be, that trees should stand in the route of the canal ; would they, after they were dug up or removed, belong to the grantee, or remain in the original owner ? I apprehend, in the latter ; and if so, in what respect does that differ from the case of the soil. Each, before the severance, was part of the freehold. Why should one pass, any more than the other, to the grantee, if not necessary for the purposes of constructing the canal ? The ar-

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gument of the plaintiff proceeds upon the ground, that the property of the materials might be beneficial to him, and constitute some recompense for his labours. Be it so; but that does not make it a matter of right. There may be many conveniences, which yet do not pass as incidents to a grant. When the parties make their contracts, it is their duty to provide for such conveniences. When the law is called upon to interpret their acts, it has nothing to do with such matters; it can act only upon necessary incidents, or implications. My opinion is, that in the present deed, there is no express grant of any right to any soil; that it is not implied as an incident to any thing granted; that the liberty to dig a canal imports no more than a right to separate and remove the soil for the purposes of the canal; and, that such a liberty is quite consistent with the proprietary interest in the soil remaining in the grantor. Upon this ground, I think the bill must be dismissed.

It is unnecessary to touch the question, whether this case be a fit case for equity jurisdiction, supposing the bill were maintainable in point of fact, as it is contended a complete remedy exists at law. We may leave that point for decision, when it becomes necessary to the judgment of the Court.

Bill dismissed.



JOB GREENE vs. DANIEL DARLING & CHARLES B. JENKS.

Courts of equity, independently of any statute of set-off, do not exercise jurisdiction to set off mutual disconnected debts, unless where the dealings of the parties imply it as matter of agreement, or *mutual credit*.

Quare, whether in *Rhode Island*, judgments can be set off against each other, where the debt due to the plaintiff has been assigned before suit brought.

An award, upon a submission of a question whether the parties had a right of set-off, is conclusive.

Quare, whether a decision by a court of law, of concurrent jurisdiction on the same point, would not be conclusive.

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How far notice of a set-off is necessary to defeat the rights of an assignee.

Quære, whether a party, who has procured an assignment of a debt of the plaintiff, can set it off against his own debt due to the plaintiff, which was previously assigned.

Where a set-off or defence to a debt was available at law, and the party omitted by laches to take advantage of it, it seems a court of equity will not relieve him.

BILL in equity, for an injunction, set-off, and relief, against a judgment rendered in the Circuit Court, at November Term, 1826.

The cause was argued by *Bowen* and *Whipple* for the plaintiff, and by *Randall* and *Searle* for the defendants.

STORY J. The present is a bill for an injunction and relief by way of set-off, against a judgment obtained in this Court, at November Term, 1826, for \$695.48. That judgment was rendered in a suit, brought in the name of *Daniel Darling*, trustee to *James Wheaton 3d*, against the plaintiff, on a bond given for the liberty of the prison limits by *John Pond*, as principal, and by the plaintiff and one *Stephen Buffum*, as sureties, and binding them jointly and severally, in the form prescribed by the statute of *Rhode Island*. The verdict and judgment were founded upon an escape proved at the trial. *Pond* was committed to the gaol in *Providence* on the 20th of March 1824, on an execution founded on a judgment against him in favour of *Daniel Darling*, trustee to *James Wheaton 3d*, for \$529.79, and upon that occasion this prison bond (as it is called) was given. This last judgment was founded on a promissory note, dated on the 27th of April 1821, whereby *Pond* promised to pay *Darling* \$426.58 on demand, with interest. The note was not negotiable, and therefore, to whomsoever it might be assigned, it could be sued only in the name of the original payee. In point of fact, it passed by assignment to several intermediate persons, and finally, before the commencement of the original suit, was assigned to *Wheaton*, fraudulently, as the bill suggests for whose benefit the suit was instituted. Afterwards, on the 21st of January 1825, *Wheaton*

assigned the original judgment and bond to the defendant, *Jenks, Darling* joining in the assignment; and this assignment, also, is suggested in the bill to be fraudulent. The suit on the prison bond was returnable to the June Term, 1826, of the Circuit Court.

The case of set-off stated in the bill is, that the plaintiff is now in possession, as his own property, of certain notes of hand, given by *Darling* to *Pond*, on the 20th of May 1825, to the amount of \$1138, which he claims to have set off against the judgment, on the prison bond. The history of the consideration of these notes is stated as follows. *Darling*, on the 24th of June 1820, gave his note for \$1332.88 payable to *Pond* or order on demand, with interest. A suit was brought against *Darling* upon this note by *Pond*, and a judgment obtained thereupon at September Term of the Supreme Court of *Rhode Island* 1823, the very same term, in which the original judgment was rendered in the same Court in favour of *Darling*, as trustee to *Wheaton*, against *Pond*. At that time an attempt was made to set off the judgments against each other; and the attornies of the parties, without the knowledge of *Pond*, (as he asserts,) submitted the question of the set-off to *Wheeler Martin Esq.*, one of the justices of the same Court, who decided against the set-off, and executions issued accordingly upon both judgments, and *Darling* and *Pond* were both committed to gaol on execution, for the judgments against them respectively. *Pond* remained in gaol until he was discharged under the insolvent act of the state, on the 17th of April 1826. *Darling* remained in gaol until the 20th of May 1825, when an arrangement was made between him and *Pond* without the knowledge or assent of *Wheaton*, *Darling* undertaking to discharge the judgment against *Pond*, and *Pond*, deducting the amount of that judgment from his own against *Darling*, and taking from the latter the notes already mentioned for \$1138, as the balance due him on his own judgment. It is farther stated in the bill, that *Darling* was insolvent at the time

of the execution of the first note to *Pond*, in June 1820, and hath ever since remained so. It is suggested in the bill, that *Wheaton* is now deceased; and no attempt is made to bring his personal representative before the Court; and no reason is assigned for the omission.

Such is the posture of the case, as it stands upon the plaintiff's bill; and passing, for the present, the consideration, how far it stands supported in point of fact as to the very material allegations, that the assignments to *Wheaton* and *Jenks* were wholly without any consideration and fraudulent, (which are explicitly denied by the answer of *Jenks*,) let us examine, whether in a court of equity the plaintiff is entitled to the relief prayed for, supposing the whole ground work of his bill to be established.

The first question presented upon a general survey of the case is, as to the jurisdiction of courts of equity to compel a set-off, where there is no legal provision to enforce it. In the state of *Rhode Island*, the right of set-off is by statute extended only to cases of judgments and executions. The statutes of 1798 and 1822, (the latter being only a revision of the former,) provide, "that whenever the Supreme Judicial Court, or Courts of Common Pleas shall, at the same term, render final judgment in two or more causes, *in which the parties shall be reversed, and shall sue and be sued in the same right and capacity*, such Court shall offset the same judgments, and issue execution for the balance in favour of the party, to whom it shall be due;" and, "that if any officer shall at any time have two or more executions in personal actions directed to him to serve, in which the parties shall be reversed, and shall sue and be sued in the same right and capacity, he shall offset the same, and levy and collect the balance only from the party, from whom it is due."

To bring any case within the reach of the statute, the parties must be reversed, and sue and be sued in the same right and capacity. Now the bill itself admits, that the very question, whether the two original judgments rendered at September

Term 1823 were under the statute liable to be set off, was submitted to a judge of the Court, and that he decided, that they could not be set off at law, because the parties were not reversed in the same right and capacity. It is said, that this was an extrajudicial act, and not the act of the Court, and therefore, it does not bind as a judgment of the Court. Be it so; but if the parties have submitted it to the decision of a judge, they are bound by that decision, as an award; and unless some other equity intervene, it ought to conclude them. Then it is said, that the submission was without the knowledge of *Pond* by his attorney; but that, in point of fact, is not established by any evidence. And if it were, it remains to be shown, that it is beyond the scope of an attorney's general authority in cases of this nature. Cases rather more questionable have been held within his authority.¹ And if he exceeds it, the remedy for his client is to be sought in his own personal responsibility.

But it may not be wholly immaterial to consider, whether there has been any such error in the award or decision, as the argument supposes. The statute of *Rhode Island* applies solely to suits brought in the same right and capacity. Now, in a strict sense, a suit brought by *Darling*, as trustee of *Wheaton*, was not a suit in the same right and capacity, as the suit against him, which was in his own right. Supposing the assignment to be *bonâ fide*, it is by no means clear, that the statute of *Rhode Island* meant to reach such a case as the present. Here, the note to *Pond* was negotiable, and *non constat*, that the parties at the time of the assignment to *Wheaton* knew, that it had not been negotiated. There may be an equity in allowing unconnected demands to be set off against each other, where they are both subsisting at the same time, and one has been assigned. But it is by no means so clear an equity, as necessarily to justify an enlarged construction of a statute. For aught that this Court

¹ *Com. Dig. Attorney, B. 9, 10.*—*Inhabitants of Buckland vs. Inhabitants of Conway*, 16 *Mass. R.* 396.

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can judicially know, it may have been the policy of the legislature of *Rhode Island* to exclude its own courts from exercising any jurisdiction of set-off, in cases where there had been *bonâ fide* assignments.² Where the assignment is without consideration and a fraudulent evasion of the statute, it might justly be held a mere nullity, and the case within the relief intended by the statute. There is a great distinction between the case of an equity attaching to the very demand assigned, and an equity personally existing in the debtor to set off an unconnected debt. The cases, which are found in the reports in other states, for the most part turn either upon their own statutes, or upon principles of the common law, where there are no statutes to govern them. They do not necessarily involve principles, which ought to control the construction of a statute differently framed.³ I do not mean to say, that the statute ought to receive the construction, which the judge is supposed to have given it, acting upon the ground of its being a case of a *bonâ fide* assignment, (as he must be presumed to have done); that is not necessary to be decided, in my view of the case. But if it be doubtful, it is very far from being certain, that upon the reference of a doubtful point to him his decision, even if founded on what may now be deemed a mistake in law, is to be overturned. The point of view in which his decision is now considered, is not as a judicial decision, but as an award. If it had been a judicial decision, it would have required grave consideration, how far it could be re-examined in a Court of equity, since there are conflicting doc-

² See *Allop vs. Caines*, 10 Johns. R. 396.—*Makepeace vs. Coates*, 8 Mass. R. 451.

³ See *Goodnow vs. Buttrick*, 7 Mass. R. 140.—*Hatch vs. Greene*, 12 Mass. R. 195.—*King vs. Fowler*, 16 Mass. R. 397.—*Stewart vs. Anderson*, 6 Cranch R. 203.—*Murray vs. Williamson*, 3 Binn. 135.—*Robinson vs. Beale*, 3 Yeates R. 267.—*Simson vs. Hart*, 14 Johns. R. 63.—*Mitchell vs. Oldfield*, 4 T. R. 123.—*Glaister vs. Hewer*, 8 T. R. 69.—*Doe vs. Darnton*, 3 East, 140.—*Crosse vs. Smith*, 1 M. & Selw. 545.—*Tucker vs. Oxley*, 5 Cranch, 34.—*James vs. Kynnier*, 5 Vez. jun. 108.—2 Madock Ch. Pr. 512.

trines on that point. In *ex parte Flint*, (1 *Swanston*, 30,) Lord *Eldon* seems to have thought, that if he would grant relief in a case already distinctly decided at law, it ought to be clearly made out, that there was such a mistake. The case of *Billon vs. Flyde*, (1 *Vez. R.* 327,) also seems to justify relief in case of a clear mistake of the law, though that case was compromised.⁴ On the other hand, the late learned Chancellor of New York, in *Simpson vs. Hart*, (1 *Johns. Ch. R.* 91,) after a very full examination of the authorities, came to the result, that such relief ought not to be granted after a decision of the very point by a Court of concurrent jurisdiction. His opinion was, indeed, overturned by the court of errors, but under circumstances of such diversity of judgment among very able judges, that one may well pause, until the point shall be the very hinge on which the cause shall turn.

Assuming, however, that the award in the present case ought not to be conclusive, what are the grounds, upon which a Court of equity ought to interpose; or in other words, what is the jurisdiction, which it is accustomed to exercise in respect to set-offs? I do not speak here of cases, where distinct equities arise from other sources; but upon the naked equity of distinct and unconnected debts, and independently of any statuteable regulations.

It is not very easy to ascertain the exact nature and limits of this jurisdiction from the *English* authorities. Down to the publication of Mr. *Montague's* Book on "Set-off," there does not seem to be any very clear doctrine laid down; for his treatise on this head is singularly brief and unsatisfactory, and consists but of three sentences. Mr. *Maddock*⁵ has done little more to enlighten us on the subject, and has merely collected the authorities, principally in bankruptcy.

⁴ *Bell's Supplement to Vezey*, 159.—See *Dinwiddie vs. Bailey*, 6 *Vez.* 136.

⁵ 1 *Madd. Ch. Pr.* 70.—2 *Madd. Ch. R.* 512, 513.

It has been said, that before the statutes of set-off at law, and the statutes of mutual debts and credits in bankruptcy, courts of equity were in possession of the doctrine of set-off, and acted upon it, as grounded upon principles of natural equity ; and that now, when the Court does not find a natural equity going beyond the statutes, the construction is the same in equity as at law. But that the bankrupt act, enabling the party to prove the balance of the account upon *mutual credit*, has gone much farther than the party could have gone either in law or equity before, as to set-off.⁶ This is not a very instructive account of what the jurisdiction in equity actually is. Lord *Mansfield*, in *Green vs. Farmer*, (4 *Burr.* 2214, 2220,) said, that “*natural equity* says, that cross demands should compensate each other, by deducting the less sum from the greater ; and that the difference is the only sum, which can be justly due. But positive law for the sake of the forms of proceeding and convenience of trial, has said, that each must sue, and recover separately in separate actions. Where the nature of the employment, transaction, or dealing, necessarily constitutes an account consisting of receipts and payments, debts and credits, it is certain, that only the balance can be the debt ; and by the proper forms of proceeding in courts of law or equity the balance only can be recovered. Where there were *mutual debts unconnected*, the law said they should not be set off ; but each must sue. *And courts of equity followed the same rule, because it was the law ;* for had they done otherwise, they would have stopped the course of the law, in all cases where there was a mutual demand.” If his Lordship be correct in this account of the matter, courts of equity did not antecedently to the statutes exercise any jurisdiction as to set-off, unless some equity intervened, independently of the fact of mutual, unconnected debts. *Lanesborough vs. Jones* (1 *P. Will.* 325) has been thought to establish an equitable right of set-off under other cir-

⁶ *Ex parte Stephens*, 11 *Vez.* 26.—*Ex parte Blagden*, 19 *Vez.* 464.

cumstances.⁷ But it is questionable upon the report of that case, whether the act of parliament, under which an assignment was made of *Coggs's* estate, did not subject him to the general operation of the provisions of the bankrupt acts; for the act of 4 *Ann*, ch. 17, § 11, as to mutual credits, formed the ground-work of the reasoning of the Court. If, however, the case turned upon a more general ground, it was, that the *mutual credit*, and the additional fact of *Coggs's* insolvency, created a new equity.⁸ The case, there put, of a set-off of a separate debt against a partnership debt, where there is a surplus belonging to the debtor partner, was not decided. *Ex parte Edwards* (1 *Atk.* 100) looks more towards the establishment of that point; but that case was not brought to a decision. In *Ex parte Quinton*, (3 *Vez.* 248,) the point was decided. But that case has been shaken by later decisions, and particularly by *Ex parte Twogood*, (11 *Vez.* 517,) and *Addis vs. Knight*, (2 *Meriv. R.* 117.) And, at all events, the fact of bankruptcy also intervened. It is also material to observe, that in all these cases the neat point did not arise, as to the mere set-off of mutual debts, but of joint debts against separate debts, or *è converso*. Now the general rule in equity is like that at law, that there can be no set-off of joint debts against separate debts, unless some new equity justify it.⁹ Such an equity may arise under circumstances of fraud; or where the party seeking relief is only a surety for a debt really separate; or where there are a series of transactions, in which joint credit is given with reference to the separate debt.¹⁰

The strong impression left upon my mind by other authorities is, that Lord *Mansfield's* doctrine, as to the jurisdiction of set-

⁷ *Montague on Set-off*, B. 2, p. 60.

⁸ See *Simson vs. Hart*, 14 *Johns. R.* 63.

⁹ See cases cited 3 *Mason R.* 145.—*Ex parte Twogood*, 11 *Vez.* 517.—*Vuilliamy vs. Noble*, 3 *Meriv. R.* 593, 618.

¹⁰ *Ex parte Stephens*, 11 *Vez.* 24.—*Ex parte Blagden*, 19 *Vez.* 465.—*Ex parte Hanson*, 12 *Vez.* 346.—S. C. 18 *Vez.* 252.—*Vuilliamy vs. Noble*, 3 *Meriv. R.* 593, 618, 619, 621.

off in equity, is not in its general latitude, and without some qualifications, maintainable. It seems irreconcilable with what fell from Lord Cowper, in *Lanesborough vs. Jones*, (1 *P. Will.* 326,) who said, that "it was *natural* justice and equity, that in all cases of *mutual credit* only the balance should be paid;" and that if *Coggs* had not been bankrupt, and had brought a bill to foreclose his mortgage, he could have recovered only the balance, after deducting the notes due to the other party. Lord Cowper here relies on the fact of *mutual credit*, (by which I understand him to intend, a credit founded on a knowledge of, and trust to, the existing debts,) as itself, in a case of insolvency, furnishing an equity. And other cases well warrant that distinction. It was acted upon by the Lord Keeper in *Curzon vs. The African Company*, (1 *Vernon R.* 121.) In *Downam vs. Mathers*, (*Preced. Ch.* 580,) where there were mutual dealings on each side, and independent debts, the Lord Chancellor held, that a set-off ought to be allowed, because the mode of dealing furnished a strong presumption of an *agreement* to this purpose, and that without such liberty of retaining against each other, the parties would not have continued on their dealings. In the case of *Hawkins vs. Freeman*, (2 *Eq. Abridg.* 10 *pl.* 10 *S. C.* 8 *Viner Abridg.* 560, *pl.* 26.) the decision was precisely to the same effect.¹¹ *Peters vs. Soame*, (2 *Vernon R.* 428,) probably turned on the same point. The like presumption of mutual credit, and right of stoppage flowing therefrom in equity, was acted upon in *Jeffs vs. Wood*, (2 *P. Will.* 128,) where the Master of the Rolls seems, indeed, to intimate his own opinion, that a broader doctrine might be maintainable; and that very slight circumstances ought to be taken hold of to justify the presumption. In *Whitaker vs. Rush*, (*Ambler. R.* 407,) Sir Thomas Clarke, the Master of the Rolls, gave a history of the doctrine, and laid

¹¹ See also Lord Hale's decision cited in *Chapman vs. Derby*, 1 *Vernon R.* 117.

great stress on the distinction, whether there was *mutual credit*, or not. He said, that "it was a rule of justice to set off one debt against another in the *Roman law*. That rule did not prevail in *England* for many years. The dealings between bankrupts and other persons first gave occasion to its being introduced into *England* by statute of 5 *Geo. 2.*" (It had been introduced before by a temporary statute, 4 *Ann*, ch. 17, § 11.) "Equity took it up, but with limitations and restrictions, and required, that there should be a *connexion between the demands*. In *Downam vs. Mathers*, Lord *Macclesfield* said, that the mutual dealing raised a presumption, that the one should be set off against the other." And he founded his decree, in part, upon the fact, that there was no connexion in the demands in that case. The same principle runs through later cases, such as *James vs. Kynnier*, (5 *Vez.* 108,) and *Valliamy vs. Noble*, (3 *Merivale* lt. 593, 618,) and *Ex parte Flint*, (1 *Swanston R.* 80.) The phrase *natural equity* occurs frequently in the reports in cases on this subject; and it is difficult to give it any rational interpretation in the places, where it occurs, unless it means, that there is a natural equity to have mutual and disconnected debts set off, which courts of chancery will, in certain cases, enforce.¹² This is the ground, upon which courts of law have vindicated their right to set off judgments against each other. The doctrine is strongly hinted at on various occasions; and, indeed, I know not how, upon any other principle than this, many of the modern decisions in equity can be supported. In *James vs. Kynnier*, (5 *Vez.* 108,) the Lord Chancellor said, "Is there any doubt, that where there are *mutual credits* between the parties, though they cannot set off at law, yet it is the common ground for a bill? If *J.* had brought an action against *M.* upon the note, *supposing no bankruptcy had taken place*, I

¹² *Ex parte Stephens*, 11 *Vez.* 24, 27.—*Ex parte Flint*, 1 *Swanston R.* 30.—See also what is said by Lord *Mansfield* in *Collins vs. Collins*, 2 *Burr.* 820, 826.

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should have stopped the action while he was debtor on the bond." In *Lechmere vs. Hawkins*, (2 *Esp. R.* 626,) Lord Kenyon recognized the authority of courts of equity to enforce a set-off, when refused at law, even where the party had come under an honorary obligation not to insist on it; and this doctrine was affirmed in *Taylor vs. Okey*, (13 *Vez.* 180.) *Ex parte Hanson* (12 *Vez.* 346) assumes, that some jurisdiction existed before the statutes, as does *ex parte Blagden*, (19 *Vez.* 465.)

The conclusion, which seems deducible from the general current of the *English* decisions,¹³ (though most of them have arisen in bankruptcy,) is, that courts of equity will set off distinct debts, where there has been a *mutual credit*, upon the principles of natural justice, to avoid circuitry of suits, following the doctrine of compensation of the civil law to a limited extent.¹⁴ That law went farther than ours, deeming the debts, *suo jure*, set-off or extinguished *pro tanto*; whereas, our law gives the party an election to set off, if he chooses to exercise it; but if he does not, the debt is left in full force, to be recovered in an adversary suit.¹⁵

Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts;¹⁶ they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law, such as has been already alluded to. And, on the other hand, courts of law sometimes set off equitable against legal

¹³ *Mitchell vs. Oldfield*, 4 *T. R.* 123.—*Barker vs. Braham*, 2 *W. Bl.* 869.—*S. C.* 3 *Wils. R.* 396.—*Glaister vs. Hewer*, 8 *T. R.* 69.—*Simson vs. Hart*, 14 *Johns. R.* 63.—*S. C.* 1 *Johns. Ch. R.* 93.—*Waln vs. Bank of N. America*, 3 *Serg. & R.* 73.

¹⁴ 1 *Pothier Oblig. (by Evans)*, p. 365.—2 *Pothier, (by Evans,) App.* 13, p. 98.

¹⁵ *Id. Ibid.*

¹⁶ See *Taylor vs. Okey*, 13 *Vez.* 180.

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debts, as in *Bottomley vs. Brooke*, (cited 1 T. R. 619.)¹⁷ The American Courts have generally adopted the same principles, as far as the statutes of set-off of the respective states have enabled them to act.¹⁸

As, then, in the most favourable light, in which the jurisdiction of courts of equity can be viewed, the mere existence of distinct debts without mutual credit did not give a right of set-off in equity,¹⁹ it will be difficult to establish, that in a state not recognizing any set-offs by its own statutes, except of judgments and executions, a court of equity sitting here ought to assume a broader jurisdiction. I agree, that this Court has a general equity jurisdiction; but it cannot go beyond the principles, which belong to that jurisdiction.

Let us consider, then, the circumstances, upon which the interposition of the Court is asked in the present case.

In the first place it is said, that here there were mutual debts existing between *Darling* and *Pond*, and that an equity existed to have them set off against each other, which attached to the debts themselves, and travelled with them into whosoever hands they might come; and therefore it ought now to be asserted in favour of the assignee of *Darling's* debt against the assignee of *Pond's* debt, assuming both assignments to be *bonâ fide*. That the balance only after such deduction could be recovered by *Pond*; and nothing could be recovered by *Darling*.

This is a very comprehensive proposition; and it is very desirable to have had some authorities cited, which bear it out in

¹⁷ See *Crosse vs. Smith*, 1 M. & Selw. 545.

¹⁸ See *Caines vs. Brisban*, 13 Johns. R. 9.—S. C. 10. Johns. R. 398.—*Gordon vs. Bouns*, 3 Johns. R. 150.—*Ford vs. Stuarts*, 19 Johns. R. 342.—*Carpenter vs. Butterfield*, 3 Johns. Cas. 145.—*Duncan vs. Lyon*, 3 Johns. Ch. R. 351.—*Goodwin vs. Cunningham*, 15 Mass. R. 193.—*Haleh vs. Greene*, 12 Mass. R. 195.—*Jones vs. Whitter*, 13 Mass. R. 304.—*Johnson vs. Bridge*, 6 Cowen R. 693.—*Mc Donald vs. Neilson*, 2 Cowen R. 139.—*Murray vs. Williamson*, 3 Binn. R. 135.—*Primer vs. Kuhn*, 1 Dall. 452.

¹⁹ See 2 Evans's *Pothier on Obligations*, p. 98.

its full extent. None, however, have been cited at the bar ; and the Court is left to grapple with it without such assistance. My own researches have not enabled me to find a single case, in which, to such an extent, it is decided, or even intimated ; and unless the preceding view of the *English* decisions on this subject is erroneous, none can be presumed to exist in *England*. For if a court of equity there would not set off debts, unless there was some mutual *credit* relative to them, arising from the course of dealing of the parties, it cannot be that any equity of set-off attaches to the debt itself.

Where a chose in action is assigned, it may be admitted, that the assignee takes it subject to all the equities existing between the original parties, as to that very chose in action, so assigned. But that is very different from admitting, that he takes subject to all equities subsisting between the parties as to other debts or transactions. There is a wide distinction between the cases. An assignment of a chose in action conveys merely the rights, which the assignor then possesses to that thing. But such an assignment does not necessarily draw after it all other equities of an independent nature.

Then, again, what is the right of set-off? By our law it is not a compensation, balancing debts *pro tanto*, as in the civil law ; but mere matter of defence.²⁰ The party is not bound to make use of it. He has his election ; and if he does not assert it, his debt is not extinguished. It is a *personal* privilege, and not an incident or accompaniment of the debt. If a person assign a debt, he does not thereby assign any equity he may have to set it off against the debtor. Set-offs can only be between the parties to the record, or those for whose benefit the suit is brought. An assignee of a debt may set it off against a debt due by himself to the plaintiff ; but certainly not against a debt due from the assignor to the plaintiff ; nor could the assignor himself, after such

²⁰ See 2 Evans's *Pothier on Obligations*, No. 13, p. 98.

assignment, set it off against the plaintiff. The right of set-off, in short, does not depend upon the mutuality of debts in their origin, as an inherent quality attaching itself to such debts, but upon the situation and rights of the parties, between whom it is sought to be enforced; and whether the suit be at law or in equity, there must be personal debts existing between them, and not merely between either of them, and third persons. As has been very properly remarked at the bar, it is a privilege or right attaching to the remedy only; which in some states may be allowed by their laws, and in others, denied. But it touches not any obligation of contract or vested right.

But it is said, that the right of set-off is an equity, which at all events the original debtor may assert against the assignor, and also against his assignee of the debt, whether he has, or has not notice of its existence. If by an equity is meant a mere dictate of natural justice in a general sense, it is not worth while to discuss it, because this Court is not called upon to administer a system of mere universal principles. If by an equity is meant a right, which a court of equity ought to enforce, it remains to be proved, that such an equity exists in the jurisprudence, which this Court is called upon to administer. The *English* court of chancery has as yet laid down no such general rule. Where there are mutual debts subsisting, and there is either an implied or express agreement of stoppage *pro tanto*, or mutual credit, doubtless a court of equity would enforce it against the party himself, and against his assignee with notice; that it would enforce it against his assignee without notice is not so clear; and to say the least of it, would trench upon some of its known doctrines, for the protection of *bona fide* purchasers.

There are some *American* cases, in which a doctrine approaching to this extent has been entertained by courts of law; but, upon examination, they will be found to rest either upon the construction of local statutes, or upon local jurisprudence. *Stewart vs. Anderson* (6 *Cranch*, 203) belongs to the former class.

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Robinson vs. Beale, (3 Yeates R. 267,) possibly belongs to the latter. No reasons are given for it; and it may have turned upon the more general doctrine, or upon the settled construction of the statute of set-off of *Pennsylvania*. In *Greene vs. Hatch*, (12 Mass. R. 195,) it was held, that judgments might be set off against each other notwithstanding an assignment, where the demands, on which the judgments were founded, were coeval, and the assignee had notice. But in *Makepeace vs. Coates*, (8 Mass. R. 451,) the same Court refused to set-off judgments, where there was an assignment, made by an insolvent debtor, and the party, who sought to set off his judgment, had purchased the demand after the insolvency, but before the assignment. And *King vs. Fowler* (16 Mass. R. 397) shows the extreme caution of the Court in interfering in such cases. In *Alsop vs. Caines*, (10 Johns. R. 396,) the Court thought, that cases of complicated trusts, where the debt sued for was assigned, and the nominal plaintiffs were alleged to be trustees of a debtor of the defendant, were not fit subjects of set-off at law, upon grounds, which it seems extremely difficult to answer. That case was re-examined in 13 Johns. R. 9, and confirmed on a writ of error perhaps for different reasons. One of the judges in the court of errors stated, that the assignee took the debt subject to all the equities between the original parties, of which the right of set-off was one; but this point was not relied on by the only other member of the Court, who delivered an opinion. In *O'Callaghan vs. Sawyer* (5 Johns. R. 116) it was decided, that the holder of a note assigned, after it became due, took it subject to all equities, which existed against it between the original parties, not only as to the note itself, but as to set-offs. And this decision has been followed in the *Bank of Niagara vs. Mc Cracken*, (18 Johns. R. 493,) and *Ford vs. Stuart*, (19 Johns. R. 342,) and may be considered as the settled law of that state, not only as to set-offs of debts, but of judgments against each other.²¹ In the

²¹ See also *Gould vs. Chase*, 16 Johns. R. 226.—*Henry vs. Brown*, 19 Johns. R. 49.

latter case the principle applies as well, where the judgments have been assigned, as where they remain in the original parties;²² but in neither case can a set-off be allowed of a debt due from the assignee, and not from the plaintiff on record.²³

These are the most material of the *American* cases, which have fallen under my observation; and they are open to some remarks. In the first place, most of them purport to be founded upon local statutes, where the right of set-off in common law suits before judgment is provided for by statute, and the question was, under what circumstances that right should be allowed, or defeated at law. In *Rhode Island*, no like statute of set-off exists; and what might be very fit in order to carry into effect the legislative intention once expressed, may not be equally fit to be assumed, as mere matter of equity, independently of any such intention. In the next place, those cases, which are set-offs of judgments, proceed upon the general authority of courts of law in their discretion to set-off judgments, upon what such courts may deem an equity, (a jurisdiction, full of delicacy and danger in cases of complicated trusts and assignments, as the cases sufficiently instruct us,) where there is no statute to regulate it. In *Rhode Island*, there is a statute, which limits such set-offs to cases, where the parties are reversed, and sue in the same right and capacity. There is no pretence to say, that in *Rhode Island* an assigned judgment of a third person against the plaintiff could be set off in favour of the defendant, who had purchased it, against the plaintiff's own judgment. The parties in such case would not be reversed. There being then no statute of set-off of mutual demands generally in *Rhode Island*, no right of set-off can arise *at law* between the parties themselves, as to such demands, which ought to be protected by courts of equity, and up-

²² *Chamberlain vs. Day*, 3 Cowen R. 353.

²³ *Wheeler vs. Raymond*, 5 Cowen R. 231.—*Johnson vs. Bredge*, 6 Cowen R. 693.

held against subsequent assignments. If such right exists in equity, it is because courts of equity have created it, independently of law. I have endeavoured to show, that such a right has not yet been recognized in equity from the mere existence of mutual debts, even in regard to the parties themselves.

But if it were otherwise, it would present quite a different consideration, where a debt had been assigned *bonâ fide* before suit. In such a case, if the assignee had no notice of any existing counter demand, where is the equity of giving it effect against him? It would in *Rhode Island* be quite a different thing, where the debt was assigned after both the judgments were rendered; for then the rule of the *American* cases might bear upon the question with far more force, I do not say with how conclusive a force. It would then be a case, where a court of equity would be called upon to enforce a *legal* right of set-off against an assignment, which would interrupt it.

In this view of the matter it is, in my judgment, most material to disprove, that the assignment to *Wheaton* was *bonâ fide*. And, indeed, if an assignment was *bonâ fide* made to any other of the assignees, through whom he claims, he seems entitled to the full protection of their title. The presumption of *bona fides* is certainly strong, from the award of Judge *Martin*. It is asserted in *Jenks's* answer, and he also maintains, that the assignment to himself was *bonâ fide*, and for a valuable consideration. Upon both of these points, much testimony has been introduced by the parties, some of which is quite loose and unsatisfactory, and of doubtful character. It is questionable, whether *Darling's* testimony is competent; but it is unnecessary to decide that, as it is completely demolished by the opposing evidence, so far as it constitutes a ground of reliance for the plaintiff. I do not say, that there are no circumstances of suspicion attached by the evidence to the title of *Wheaton* and *Jenks*; but taking the clear denial of the answer with the corroborative proofs, the weight of the evidence is strong in favour of the *bona fides* of the title,

and purchase of both. It is so strong, that a court of equity would not be at liberty upon its own principles to decree otherwise ; or at least, sitting in equity, I should feel it my duty to abstain from such a decree. It must be taken, therefore, that the title and purchase of *Wheaton* and *Jenks* stand both unimpeached, and unimpeachable.

But if this difficulty were not absolutely insuperable, there are some others, which lie in the way of the relief sought, of no inconsiderable magnitude. In the first place, it is by no means clear, that the plaintiff has made out any title by assignment from *Pond* of the very debt, which he seeks to set off. That debt is not the judgment of *Pond*, for that has been discharged ; and, as a matter of set-off under the *Rhode Island* statute by way of judgment, it is gone. The notes now set up as a set-off grew out of that judgment, but they cannot be now set off, as a remaining part of that judgment. They are to be set off, if at all, as debts *in pais* by simple contract. The plaintiff's title and property in the notes are expressly put in issue by the answer, and it is denied, that they constitute a good subsisting debt even against *Darling*. Now, there is some cloud thrown over the original validity of the debt, on which the judgment against *Darling* was founded, which ought to have been removed, since it goes to the very gist of the argument, on which the plaintiff rests his claim for relief ; I mean, the existence of mutual debts between *Pond* and *Darling*. And then, again, there is no proof, that these notes have been transferred by *Pond* to the plaintiff *bonâ fide*, and for a valuable consideration. If he holds them merely in trust for *Pond*, he is not entitled to maintain them as a set-off to his own debt.²⁴ For assuming, that where there is a separate debt, secured by a joint bond as security, upon equitable considerations a creditor, who has such joint security, cannot re-

²⁴ See *Gilman vs. Van Slych*, 7 Cowen R. 469.—*Satterlee vs. Ten Eyck*, 7 Cowen R. 480.

sort to it without allowing a separate debt, which the debtor has against him to be deducted, where there has been mutual *credit* ;²⁵ still that is to be done upon application by the debtor, and not by the surety without his assent, or at least without his being made a party.

If this difficulty were overcome, still there is the fact, that the debt was assigned by *Pond* to the plaintiff, after the judgment and bond were assigned to *Jenks*, and with full notice of all the facts. The bill does not pretend to assert the contrary ; and the assignment to *Wheaton* is apparent both upon the face of the judgment and bond. Now, if the assignments to *Wheaton* and *Jenks* were *bonâ fide*, it would be hard to say, that their equity to satisfaction should be defeated by a subsequent purchase by the plaintiff of a debt of *Darling's*, with full notice of such equity, under circumstances like the present.

I have said, that difficulties would exist, even if the assignments to *Wheaton* and *Jenks* were not *bonâ fide*, and the reason is, that they may protect themselves against the set-off by establishing any *bonâ fide* assignment in those, under whom they claim. They claim through *Henry Thayer* and *John Thayer*. There is no pretence to say, that *Henry Thayer* is not a *bonâ fide* assignee ; and if *John Thayer* be not, upon the evidence in the case, it would seem to be a matter wholly between him and *Henry Thayer*, with which *Darling* had nothing to do. . If there be any infirmity in the title of *John Thayer*, it is an infirmity, which does not make the whole transaction void ; but only voidable, if the proper parties contest it. Be this as it may, the bill is not adapted to reach such a case, It does not make either of the *Thayers* parties ; and the answer, setting up their title and the mesne conveyances to *Wheaton*, asserts it to be *bonâ fide*. It is not established in evidence to be otherwise. And under a bill, framed like the present, it is impossible to set aside their ti-

²⁵ *Ex parte Hanson*, 18 Vez. 232.

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tle. They would be indispensable parties, as having rights, which might be vitally affected.

There is another difficulty, which has been suggested by one of the counsel for the plaintiff, and which is entitled to great weight. If the assignments were all fraudulent or void, then *Darling* continued the real owner of the debt up to the time, when he discharged it in May 1825, and consequently, if the judgment was discharged, it constituted a good defence at law to a suit on the prison bond, which was for the security of it. The defence should then have been made at law; and the bill assigns no reason, why it was not made. If a party, by his own gross laches, omits to make a defence at law, which he was competent to make, courts of equity are not in the habit of relieving him from the judgment obtained against him by his own negligence.

Upon the whole, my judgment is, that the bill ought to be dismissed, and the injunction dissolved.

Judgment accordingly.

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ROBERT STEVENS vs. NATHANIEL S. RUGGLES AND OTHERS.

The statutes of *Rhode Island* of 1768 and 1822, respecting the estates of persons dying without leaving known heirs or representatives within the *United States*, apply to cases, where the person so dying was possessed of an undivided moiety of an estate, as well as to cases, where he held the whole. And to cases where the unknown heir or representative would take an undivided portion, as well as where he would take the *whole* of the estate descended.

Quære, whether the statutes apply to any cases, where the heirs remove from the state, after the death of the person from whom they take.

A tenant in common can recover no more than his own moiety or portion of the estate, where he has not disseized his co-tenants.

EJECTMENT for certain real estates in *Newport*. The cause was heard upon a statement of facts agreed by the parties, and

was argued by *Pearce* and *Turner* for the plaintiffs, and by *R. K. Randolph* for the defendants.

The statement of facts was as follows :—That *Thomas Teagle Taylor*, late of *Newport*, in the state of *Rhode Island*, made and executed his last will and testament at said *Newport*, in the year 1769, (which was subsequently duly proved,) and died about the year 1774, seized and possessed of the demanded premises ; that all the devisees of the demanded premises, or any part thereof, at the time of his death, resided within the state of *Rhode Island* ; that their names were *Elizabeth*, *Catherine*, *Margaret*, and *Mary* ; that at the time of the testator's death, said *Catherine* was married to one *Nicholas J. Tillinghast*, and the said *Mary*, to *Rains B. Wait* ; that said *Thomas Teagle Taylor* devised the demanded premises to his wife *Patience*, who is long since dead, for life, and after her death as follows : —“ I give and devise to my daughters, namely, *Elizabeth Taylor*, *Catherine Tillinghast*, *Margaret Taylor*, and *Mary Waite*, after the decease of my said wife, all that my lot of land and dwelling-house in *Newport* aforesaid, (except such part thereof as is hereinafter disposed of,) to them and their respective heirs and assigns forever, to be equally divided between them, share and share alike, to hold in severalty. *Item*, I give and devise to my two daughters, namely, *Elizabeth Taylor* and *Margaret Taylor*, all that southwest part of my said dwelling-house in *Newport*, containing a shop, back room, and entry, chambers and garret, being the whole of the addition I made to said house, and is known by the name of the shop-part, together with the land the same stands upon. Also, all my land to the southward of said addition, and to run from thence easterly 12 feet, and from thence southerly to the dividing line between *Mr. Daniel Ayrault* and myself, to be equally divided between them and to be and remain to them, their heirs and assigns for ever.” That one *Valentine Weightman*, until his death, which happened about the year had possession of the demanded premises, and claim-

ed to hold the possession thereof, as agent of the owners of said estate, or a part of them ; that all the devisees and heirs of said estate have long since removed from this state, some to *Europe*, some to the *West Indies*, and others to parts, to the parties in this suit unknown ; that subsequent to the death of the said *Valentine Weightman*, one *Charles Brayton*, of *Warwick*, in said *Rhode Island*, was the agent of some or all of the heirs of *Catherine Tillinghast*, who were entitled to one undivided quarter part of the demanded premises, except the shop-part described in the will of the said *Taylor* herein before recited, and which shop-part was devised to said *Taylor's* daughters *Elizabeth* and *Margaret* ; that afterwards, in the year 1818, said *Charles Brayton* purchased of one *James Duncan* and his wife, their right, title, and interest, in one undivided fourth part of said estate ; that the wife of said *James Duncan* was heir at law, or one of the heirs at law, of *Catherine Tillinghast* ; that the plaintiff afterwards purchased of said *Charles Brayton* his interest in said estate by deed, bearing date the 4th day of May A. D. 1818 ; that after the deed of said *Brayton* to the plaintiff, he (the plaintiff) entered into possession of the demanded premises, and held the same until the 7th day of May A. D. 1827 ; when the town council of the town of *Newport*, by vote, directed *Clarke Rodman*, town treasurer of said town of *Newport*, to take possession of all the real estate of which the said *Thomas Teagle Taylor* died seized, lying in said town of *Newport*, to hold the same in conformity and by virtue of an act of the general assembly of the said state of *Rhode Island*, entitled, "an act securing the estates of persons dying leaving real or personal estate within this state, and leaving no known heir or others entitled to distribution within this state ;" that afterwards, on the 9th day of said May, said *Clarke Rodman* did enter into and take possession of three undivided quarter parts of said demanded premises by virtue of said authority and direction, and leased the same to the defendants, who hold the said three undivided quar-

ter parts of said estate from said *Clarke Rodman* in his said capacity ; that said defendants hold the remaining quarter part of said estate of *Robert Stevens*, the plaintiff, and are liable to, and ready to pay the rent thereof to him ; that at the time said town council directed said *Clarke Rodman* to take possession of said estate, said town council knew of no heirs of said devisees, or other person entitled to said estate residing within the *United States* ; and that said town council do not now know of any heir or other person entitled to said estate residing within the *United States* ; that since said *Clarke Rodman*, town treasurer as aforesaid, took possession of said estate, said *Robert Stevens* claimed of the town council of said *Newport* possession of said three quarter parts of said estate so taken possession of by said town treasurer, said *Robert Stevens* claiming to hold the same by virtue of his former possession, and as being himself entitled to an undivided quarter part thereof, which application was resisted by said *Clarke Rodman*, and refused by said town council ; that no person claiming said three quarter parts of said estate or any part thereof, has demanded the same of said town council, or of said *Clarke Rodman*, nor has any person as agent to any one entitled to said estate, since the same was so taken possession of by said *Clarke Rodman*, in his capacity of town treasurer as aforesaid, demanded the same, except the demand of the said *Robert Stevens* made as aforesaid. If the Court should be of opinion on this statement of facts, that the said *Charles Rodman*, town treasurer as aforesaid, has no right to take and hold said three quarter parts of said demanded premises, judgment shall be rendered for the defendants for their costs. If the Court should be of opinion, that said *Robert Stevens*, under his title as herein before set forth, and as tenant in common with the heirs of *Thomas Teagle Taylor*, is entitled to the possession of the whole estate, against the town treasurer of said town of *Newport*, that then and in that case, judgment shall be rendered for the plaintiffs, for the demanded premises and his costs.

STORY J. The demandant is admitted to be entitled to one quarter part of the estate in controversy ; and he has never been ejected from it. As to the other three quarters, the defendants are in possession of it under the town council of *Newport*, who took possession and charge of it by virtue of the statute of *Rhode Island* of 1768, empowering the town councils of the respective towns in the colony to take into their possession and care the estates of those persons, who shall die in their respective towns without leaving any heir or legal representatives in the colony, and of the statute of the same state of 1822, (*Rhode Island Dig.* 241,) in furtherance of the same object.

The demandant seems to rely upon his own possession, before the town council took possession of the estate, as sufficient to entitle him to recover the *whole* of the estate. But his possession was not exclusive of the heirs of the three quarter parts not purchased by him. He was tenant in common with them, and his possession was quite consistent with their title. No act of disseizin of them is proved, or pretended. Under such circumstances, he can recover only according to the strength and extent of his own title. The tenants, being in possession, are entitled to hold it, until he establishes some title to displace them.

The demandant seems, also, to rely upon the ground, that, as tenant in common, he is entitled to a present possession of all the estate in the absence of the heirs, because the statute was not intended to apply to any cases, except those, where there was no heir or representative or legal claimant of any portion of it within the *United States*. The words of the act of 1822 are, "that when any person shall die, leaving any real or personal estate within this state, and shall leave no known heir or legal representative within the *United States* to claim the same, it shall be lawful for the town council of the town, in which such real or personal estate shall be, to direct the town treasurer to take the same into his possession, until the heir or other legal representative of such deceased person shall call for the same." The

sound construction of this clause is, that it applies to so much of the estate of the deceased person, whether it be an undivided moiety or the whole, as is without a known heir or representative; for as to such portion of the estate, the deceased, in the very words of the statute, died, "leaving no known heir or representative within the *United States*." A co-heir or co-tenant is in no just sense the heir or representative of the deceased thereto. The case is equally within the mischief of the statute, whether the deceased be the owner of the whole, or of an undivided portion of the estate; and whether his unknown heir take the whole, or an undivided portion of it by descent. In each case, the object is to preserve the estate in the possession of the town treasurer for the benefit of the rightful owner, whenever he shall appear.

The only real doubt upon the words of the statute is, whether a person, who dies *leaving heirs or representatives* within the *United States* at the time of his death, who afterwards remove from the *United States*, and leave no representatives behind, is within its purview. In strictness of construction, the words seem limited to cases, where there is no known heir or representative of the deceased left within the *United States* at the time of his death. Perhaps it is not easy to enlarge that construction by implication, so as to reach all the mischiefs arising from subsequent events.

In the present case, it does not appear from the state of facts, what has become of the devisees and immediate heirs of the estate of *T. T. Taylor*. They are said *long since* to have removed abroad. Whether they are now living, does not appear. The fair presumption from the lapse of time may be, that all of them have died since their removal, and that thereby a descent has been cast upon their own heirs. If so, then as these last heirs are unknown, the case would be fairly within the reach of the statute to the extent of the three quarters now claimed.

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The statement is not sufficiently precise to enable the Court to draw such a conclusion with absolute certainty. The case must, therefore, be determined upon the first ground ; and for want of any title in the demandant, his right of recovery must be limited to one quarter part of the demanded premises.

Judgment accordingly.

PARDON BROWNELL vs. ELISHA DYER.

If a right of way be limited to particular purposes, and there yet be a covenant, that the same way shall be kept open and free of incumbrances, the grantor has no right to put a fence on the same, or in any other manner to obstruct the same way.

CASE for disturbance of a right of way ten feet wide. Plea, not guilty.

At the trial it appeared, that the parties respectively claimed title to the premises on each side of the way, as privies in estate of *Benjamin Eddy* and *John Young*, between whom an indenture was made on the 18th of September 1794, under which the right of way was claimed. The indenture was, in substance, as follows, viz.—“This indenture made, &c. between *Benjamin Eddy*, &c. of one part, and *John Young*, &c. on the other part, witnesseth, that the said *Benjamin Eddy* for the considerations hereafter mentioned to be kept and performed by the said *John Young*, will, on or before the 1st day of May next, lay open the following strip or piece of land off the westerly side of his house-lot, on *Westminster* street in said *Providence*, bounded and described as follows : beginning, &c. And the said *Benjamin Eddy* for himself, his heirs, executors, administrators, and assigns, doth hereby covenant to and with the said *John Young*, his heirs, &c. that the said strip of land (*which was seven feet wide*) shall from and after the said 1st day of May next forever be kept open,

free and clear of any buildings, or other encroachments, for the mutual benefit of the said parties and their assigns; and the said *John Young*, on the other part, for himself, for the considerations above mentioned, to be kept and performed by the said *Benjamin Eddy*, covenants and engages to lay open the following strip of land off the easterly side of his house-lot on said *Westminster* street, bounded and described as follows, beginning, &c.; and the said *John Young* for himself, his heirs, &c. covenants to and with the said *Eddy*, his heirs, &c. that from and after the 1st day of May next, the said described strip of land, three feet wide, and extending northerly from said street eighty feet, shall forever after be kept open for the mutual use and benefit of the said parties and their assigns, clear of any buildings, or other encroachments.

In testimony whereof," &c.

To this agreement there was added the following memorandum, signed by said *Eddy* and *Young*.

"N. B. 'T is to be remembered, that the mutual benefit expressed in the above indenture, respecting the seven and three feet of land, is to be considered as follows, viz. that each party has liberty for suitable jetts and window-frames to the houses, over it; that said *Young* has only liberty of passing and repassing occasionally for repairing and other special purposes, and for light and air to his buildings; said *Eddy* has the use of the seven and three feet for passing and repassing as a gangway at all times, and light and air, or other uses, not obstructing Mr. *Young's* privileges above described."

It appeared in evidence, that in July or August last past, the defendant, who claims under *Eddy*, put up a fence on the line of his land, and extended the fence the whole length of the way, leaving only three feet next to the plaintiff's estate (which was *Young's*) open. In front, upon the street, he also erected a gate.

The principal question at the trial was, as to the true construction of the terms of the indenture.

Brownell vs. Dyer.

The cause was argued by *Whipple* for the plaintiff, and by *Thomas Burgess* for the defendant.

BY THE COURT. The true intent of the indenture is, that there shall always be kept open for the benefit of the parties, free of buildings and encroachments, a way of ten feet. Neither party is at liberty to narrow, or enclose any part of the space so agreed to be left open. It is true, that by the memorandum *Young* has not a general right of passage for all purposes, but a limited right only "of passing and repassing occasionally for repairing and other special purposes, and for light and air for his buildings." But this use does not narrow the effect of the covenants in the indenture to have the way kept free and without incumbrances. On the contrary, the very object of the parties in respect to this limited right of way is best attained by a free passage, not only for repairing, but for light and air. The fence was, therefore, wrongfully erected by the defendant.

Verdict for the plaintiff.

UNITED STATES vs. WILLIAM HUNTER.

Where the assignee of an insolvent debtor recovers a demand, and expenses are incurred thereby, the latter are a charge on the fund, and the right of priority of payment of the *United States* attaches on the residue.

The *United States* are not bound to contribute, *pro rata*, for the sum due to them.

THIS was a bill in equity, upon the coming in of the answer to which, and a hearing thereupon, the case was by an interlocutory decree of the Court referred to a master at the June Term last. And now, at the present term, the master made his report. That part of it, which related to the question hereinafter raised, was as follows:—"I find and report, that the claim of the

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United States on the two judgments set forth in the pleadings, amount on the 15th day of November inst. to the sum of \$5064.17; that the said *William Hunter* received from the treasury of the *United States*, on the claim set out in the pleadings, \$8158.81; from which sum I have deducted \$1386.04 for the said *Hunter's* services, commissions, and expenses, in preferring and prosecuting the claim before the board of commissioners, and for receiving the money from the treasury of the *United States*, leaving a balance in his hands of \$6772.78, subject to the claim of the *United States*.

The defendant contended at the hearing, that the *United States* were bound to contribute towards the expenses, which had accrued in recovering the money, in proportion, as their debt bore to the whole amount recovered by the defendant from the *United States* on the claim in question; and that the same should be deducted from their debt. But I have decided, that the expenses should be deducted from the gross amount recovered on the claim; and that the priority of the *United States* attached on the residue, from and out of which they were entitled to receive their debt in full, if sufficient remained for that purpose."

Upon the coming in of the report, the defendant insisted, by way of exception, on the point respecting contribution, which he had contended for before the master, and which was overruled by the master.

Robbins for the defendant, and *Greene* (District Attorney) in support of the report.

STORY J. The Court are of opinion, that the master was right, and therefore overrule the exception. The expenses of recovering the money are first to be deducted from the gross proceeds received by the defendant, as a charge thereon. The neat amount, after all deductions, is that alone, which he is compellable to distribute; and to that the right of priority of the *United States* attaches. That is the fund, from which they are

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to receive payment ; and, until it is exhausted, their right of priority to the extent of satisfaction is fixed. It is like the common case of administration. There, the expenses are first deducted, and the residue is what is distributable according to the priorities established by law.

Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1829, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

UNITED STATES *vs.* AN OPEN BOAT, *Bucknam*, &c. Claimants.

Under the act of 15th of March 1820, ch. 122, prohibiting commercial intercourse from the *British* colonies in *British* ships, *British* owned vessels are included in the prohibition, although not registered or navigated according to the *British* navigation and registry acts.

But open boats, without decks, are not included in the prohibition.

The forfeiture, under the act, attaches to the cargo on board at the time the vessel enters, or attempts to enter our ports; and not to any cargo subsequently taken on board, though on board at the time of the seizure.

Where goods are seized, and claimed as forfeited as part of the cargo, the *onus probandi* is on the government to prove, that such goods were part of the cargo on board at the time of the offence.

The claimant may file a special defence on that point, if he chooses; but it is also in issue on the general denial of the allegations of the libel.

LIBEL of seizure against an open boat and her lading, seized in fact at *Eastport* on navigable waters for a violation of the laws of the *United States*, on the 4th of January 1828, by the collector of the district of *Passamaquoddy*. At the trial in the District Court, a decree of condemnation was pronounced against the boat and all her lading, except 7 barrels of flour, 2 barrels of

United States vs. An Open Boat, Bucknam and Gunnison, claimants.

pork, and 13 bags of meal, for default of any claim. The excepted goods were claimed by *Bucknam* and *Gunnison* of *Eastport*; and upon a subsequent hearing a decree of acquittal passed by consent in favour of the claimants; from which decree an appeal was taken in behalf of the *United States* to the Circuit Court.

The cause, upon the appeal, was argued by *Shepley* (District Attorney) for the *United States*, and by *Daveis* for the claimants.

STORY J. delivered his opinion as follows:—The present libel contains two counts; the first is founded upon the revenue collection act of 1799, ch. 128, § 92, which declares, that “no goods &c. of foreign growth or manufacture, subject to the payment of duties, shall be brought into the *United States* from any foreign port or place, in any other manner than by sea, nor in any ship or vessel of less than thirty tons burthen,” &c. with certain exceptions, which do not apply to the present case. The count alleges, that sundry foreign goods &c. were imported from a foreign port in this boat, the same being less than thirty tons burthen, against the form of the statute, &c. This count has been abandoned for want of evidence to support it, and may therefore be put entirely out of the case. The second count is founded on the act of the 15th of March 1820, ch. 122, prohibiting commercial intercourse with the *British* colonies. That act declares, that “the ports of the *United States* shall be and remain closed against every vessel owned wholly or in part by a subjects or subject of his *Britannic Majesty* coming or arriving by sea from any port or place in the province of *Lower Canada*, or coming or arriving from any port or place in the province of *New Brunswick*, the province of *Nova Scotia*, &c. And every such vessel so excluded from the ports of the *United States*, that shall enter or attempt to enter the same in violation of this act, shall, with her tackle, apparel, and furniture, together with the cargo on board such vessel, be forfeited to the *United States*.”

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The second count alleges, that the boat is *British* owned, came and arrived by sea from some port or place in the province of *New Brunswick*, within the port of *Lubec*; and entered the same port, and was employed in trade between said foreign port or place and the *United States*, contrary to the form of the statute.

The facts admitted to be true are, that the boat is an open boat, with a fore-cuddy, of six or seven tons burthen. She is owned by *British* subjects, and belongs to a place called *La Tete*, in the province of *New Brunswick*, and came from thence in ballast to *Eastport*, where she took on board a cargo of *American* growth and origin, for the purpose of carrying the same to the river *Maguagadavie* in the same Province. After her cargo was on board and before sailing, she was seized by the collector for an asserted violation of the laws of the *United States*.

Before I proceed to the main question, it may be well to dispose of those, which have been discussed at the bar, as in some sort of a preliminary nature.

The first question is, whether the goods now claimed are liable to forfeiture at all, it not being established by any direct proof in the cause, that they constituted any part of the cargo of the boat. This point was not made in the Court below, and now comes by surprize upon the government. Under such circumstances, if the cause turned upon it, I should have no difficulty in postponing a final decision until an opportunity was given to bring this matter of fact before the Court. The District Attorney supposes, that enough appears upon the record to raise a presumption, that these goods were part of the cargo of the boat, especially as the claim does not set up any such special defence. The claim is, indeed, in a very general form, and quite too general and imperfect to found an exact denial of the allegations of the libel, if legal nicety had been insisted upon in the earlier proceedings. It was, without doubt, competent for the claimants to have taken the present objection by a special answer, or exception, if they had chosen so to do. But if their claim and answer contain a general

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denial of all the matters in the libel, every fact alleged in the libel and necessary to maintain the asserted forfeiture, must be affirmatively established by the government ; for the case does not fall within the 71st section of the revenue collection act of 1799, ch. 128. Now it is very clear, that upon the language of the act of 1820, no goods are forfeited, unless they are part of the cargo on board the vessel ; and consequently that fact must be affirmatively established by the *United States*. I see no sufficient proof to this effect on the record ; and there is some presumption against it ; for the boat, on board of which these goods were laden, is said to have been given up by the collector ; and the boat, to which the present libel attaches, has been condemned and sold under the process of the Court. So that (to say the least of it) there is sufficient doubt to call for some farther proof and explanation.

A more material question is, what is the true construction of the act of 1820, as to the cargo liable to condemnation. Is it the cargo on board at the time of committing the *offence*, that is to say, at the time of the illegal entry, or attempt to enter ; or the cargo on board at the time of the *seizure*, however long afterwards that may be made ? The latter construction is insisted on by the District Attorney ; and the former is contended for on the other side. My opinion is, that the cargo intended by the act is the cargo on board at the time, when the vessel enters, or attempts to enter the port. The words are, " every such vessel, &c. that shall enter or attempt to enter, &c. shall, with her tackle, &c. *together with the cargo on board such vessel*, be forfeited." The offence is committed, and the forfeiture is complete at the moment of the entry, or the attempt to enter. If she has no cargo then on board, none is subjected to forfeiture ; for the words of the act do not look to any future events to impose a new forfeiture. The cargo affected with forfeiture is deemed in some sort a participator in the offence, and involved in the guilt of the vehicle. If the legislature had intended to subject every future cargo taken on board by the vessel to forfeiture, as

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of the act of 1820. The point has been fully argued in the present case, as well as in a former case before this Court ; and as all parties press for a decision upon it, and it is of great interest to the inhabitants of *Maine* bordering on the *British* provinces, the Court will not decline to express its opinion.

The true answer depends upon the point, whether an open boat, owned by a *British* subject, is a vessel within the meaning of the act of 1820. In the case of *The United States vs. An Open Boat, Noyes, claimant*, decided at the last October Term, at *Wiscasset*,¹ the point was much discussed ; and the reasoning of the Court led to the conclusion, (though there was no absolute decision) that an open boat, without decks or masts, was not a "vessel" within the purview of the statute, because in a nautical sense, as well as in the sense of our revenue and navigation laws, the term "vessel" is used in contradistinction to such boats, to indicate a class of larger sized shipping. I do not go over the illustrations used on that occasion, because the case is already before the public ; but I advert to it simply to state, that further reflection has induced me to adhere to that opinion. The boat now before the Court could not be lawfully employed in any trade from the province of *New Brunswick* to the *United States*, with goods of foreign growth or manufacture ; because such trade is prohibited by the act of 1799, ch. 128, § 92, to vessels of less than thirty tons. She was not in fact so employed. Unless she was prohibited from an entry into our ports, the subsequent act of receiving a cargo on board of *American* growth for a return voyage to *New Brunswick* constituted no offence. The words of the act of 1820 do not, in my judgment, prohibit such an entry, or such an exportation. This Court is not at liberty to look beyond the words of the act for the policy, which governed its provisions. The words must be construed according to their natural import, taken in connexion with other statutes for the regulation of commerce. It is a well known

¹ *Ante*, page 120.

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rule, that penal statutes are construed strictly ; and that forfeitures are not to be inflicted by straining the words so as to reach some conjectural policy, not avowed on the face of the statute. Even where cases lie within the same mischief, if they are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority to meet them. I must confess too, that if I were at liberty to travel out of the words of the act, and consult any supposed public policy of the government, there is no clear ground, upon which I could affirm, that boats of this description were intended by the government to be excluded from our ports, or were prohibited from carrying goods from our ports to the *British* colonies.

One argument, much pressed by the counsel for the claimants in the former, as well as in the present case, requires to be noticed. It is, that no *British* owned vessels are within the act of 1820, except such as are *British* owned and navigated in the sense of the *British* navigation and registry acts. It is said, and said truly, that this Court, sitting in admiralty, may take notice of these acts ; and that the very terms of our prohibitory and retaliatory acts invite the Court to such an examination, by the references, which are tacitly made to the *British* system. But, giving whatever force we may to this line of argument, it must still be conceded, that our own acts must be construed by their own words ; and that though the causes of our prohibitory system may be found in the corresponding *British* legislation, yet it by no means follows, that Congress was bound to stop, where that stopped ; or intended to confine its own enactments to the existing state of the *British* shipping laws. The Court then is not called upon to impose any limitation upon the words of the act of 1820, which they do not of themselves import. The words are "every vessel owned, wholly or in part, by a subject or subjects of his *Britannic* Majesty." Now, a vessel may fall within this category, although she is not registered or navigated according to the *British* acts, so as to entitle her to the statute benefits of

United States vs. An Open Boat

Garrison, claimants.

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Upon the whole my opinion is, that the decree of the District Court must be affirmed; but I shall certify that there was reasonable cause of seizure.

Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES

Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1829, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN S. SHERBURNE, District Judge.

EDWARD LOWBER vs. WILLIAM SHAW.

Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to *Africa*, &c. and authorized their agent to draw bills for the amount, if he fitted out the expedition, and he drew a bill on one of the subscribers, for the amount subscribed by him, to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was *held*, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a *constructive* acceptance of the bill, it having been dishonoured, when presented for acceptance.

ASSUMPSIT by the plaintiff as payee of a bill of exchange drawn at *Philadelphia*, by one *Edmund Roberts*, on the defendant, at *Portsmouth, New Hampshire*. The bill was dated 12th of May, 1827, for \$500 payable to the plaintiff or order, at four months, for value received "being the amount of one share and interest in the cargo of the brig *Mary Ann*." The declaration contained three counts. 1. On the bill as an accepted bill. 2. For money had and received. 3. For money laid out and expended. Plea, the general issue.

At the trial it appeared in evidence, that the defendant, with sundry other merchants at *Portsmouth*, on the 1st of December 1826, signed the following paper. "The undersigned, having subscribed the several sums set against our respective names for a contemplated voyage to the eastern coast of *Africa* and elsewhere, do hereby authorize Mr. *Edmund Roberts*, of *Portsmouth, New Hampshire*, our agent and supercargo, to draw on us for the amount subscribed, in case he should complete his arrangements, and fit out the said expedition." The defendant signed, "*William Shaw*, \$500." The bill, when presented to the defendant, on the 29th of May 1827, was refused acceptance; but the plaintiff contended, that the paper was a constructive acceptance in point of law.

The paper being read in evidence, *Roberts* was offered as a witness to prove, that he fitted out the expedition in the *Mary Ann*, and drew the bill, and that it was given for powder furnished for the voyage by the plaintiff, upon the faith of the authority of the paper, which was shown to him to procure the credit. The witness was objected to as incompetent from interest, by *Cutts* and *Bartlett* for the defendant, and the objection was resisted by *Mason* for the plaintiff.

An effort was made to prove a release by the plaintiff to the witness; but it failed from want of proof of the signature of the plaintiff, or of the subscribing witness to the release, which was produced in Court.

The defendant's counsel cited 7 *Term Rep.* 265.

STORY J. My opinion is, that the witness is competent without a release. It is the common case of an agent called upon to prove his authority and agency; and that has always been deemed an excepted case. The witness has an equal interest either way. If he drew the bill without authority, and it is recovered from the defendant, then he is responsible over to the latter. If, on the other hand, no such recovery is had, he is liable to the plaintiff. The witness must therefore be admitted.

Lowber vs. Shaw

He proved the facts above stated. In the farther progress of the cause, the defence turned upon the ground, that the witness had deviated from his authority in the shipments for the voyage, and that the facts were known to the plaintiff. It was admitted, that upon the authorities there was a constructive acceptance of the bill, if taken as the plaintiff contended, and there was no excess of authority in drawing the bill known at the time to the plaintiff. The jury found a verdict for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM 1829, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

ARCHDEACON Mc NEIL *vs.* JAMES MAGEE AND OTHERS.

Bill for a reconveyance of an estate upon an agreement and subsequent award, dismissed upon the circumstances, the bill being brought against purchasers after a considerable lapse of time, the original vendee being dead and insolvent.

Where an award directed each party to release to the other certain estate, and the term of 20 days was directed, within which the acts were to be done ; the acts are to be deemed concurrent acts, so that neither party can insist upon a release without offering to execute a release on his own part to the other party.

Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part.

After long delay and laches a court of equity will not decree a specific performance of an award, especially where there has been a material change of circumstances, and injury to the other party.

A fortiori, it will not decree it against purchasers even with notice, if their vendee is dead and insolvent so that they can have no remedy over.

Quare, in what cases a court of equity will award damages as a compensation for delay on a bill for a specific performance.

In what cases the registry of a deed is constructive notice.

The registry of a deed or paper not duly or legally recorded, is not constructive notice.

Quare, if an award respecting real estate is required to be registered by the laws of Massachusetts.

Mc Neil vs. Magee et al.

Notice, if denied by the answer, must be proved by two witnesses, or by one witness and circumstances.

If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and if not admitted by the answer, he must prove the notice before he can have relief.

A purchaser, who chooses to answer the bill generally, need not aver, that he is a purchaser without notice. The plaintiff must prove notice.

BILL in equity. The cause came to a hearing upon the bill, answers, depositions, and exhibits; and was argued by *Sumner* and *Webster* for the plaintiff, and by *William Sullivan* for the respondents. The material facts are stated in the opinion of the Court, as follows.

STORY J. This is the case of a bill in equity, which was set down for a hearing at the last term, but from circumstances, to which it is unnecessary to allude, argued at so late a period of the term, that a continuance of it for advisement became indispensable.

On the 13th of February 1808, *Mc Neil* (the plaintiff) executed two deeds of conveyance (which were recorded on the same day) to *James Magee*, (one of the original defendants but since deceased,) whereby, for the asserted consideration of \$40,000, he granted to *Magee*, in fee simple, certain parcels of land in *Charlestown, Massachusetts*. On the same day an agreement under seal was executed between the same parties, whereby, after reciting the sale by the deeds aforesaid, and that *Magee* had given his notes for the \$40,000 purchase money to *Mc Neil*, and that *Mc Neil* was indebted to sundry persons as by a schedule annexed, amounting to \$18,850, *Magee* covenanted, "that whenever the said *Mc Neil*, his heirs, &c. shall feel dissatisfied with the said security of the purchase money aforesaid, or shall require a reconveyance of the estate described by said deeds, and shall give notice thereof to the said *Magee*, his heirs, &c. he or they shall forthwith reconvey to said

Mc Neil vs. Magee et al.

Mc Neil, his heirs, &c. all right and title derived to him the said *Magee* by virtue of the two deeds aforesaid, the said *Mc Neil* giving up to the said *Magee* his notes aforesaid. And if the said *Magee* shall then have made any lease, sale, or other conveyance respecting any of the lands aforesaid, the same shall go to the benefit of the said *Mc Neil*, his heirs, &c. the notes, money, securities, or other property received in lieu thereof by said *Magee* to be transferred, &c. to the said *Mc Neil*, his heirs, &c. unless the said money &c. shall have been previously applied in payment of any of said *Mc Neil's* debts as aforesaid." And it was therein afterwards declared, that "the true intent and meaning of the aforesaid contract is, that in case the said *Mc Neil*, his heirs, &c. shall elect to deliver up to the said *Magee*, his heirs, &c. the notes aforesaid, and have the land reconveyed to him or them as aforesaid, that the said *Mc Neil* shall account for, and repay all the sums paid by the said *Magee* on his said notes; and that the said *Magee*, his heirs, &c. shall account for all the lands sold, leased, or otherwise transferred, or incumbered either by applying the avails thereof to the said *Mc Neil's* debts as aforesaid, or any part thereof, or by transferring the said proceeds specifically to the value thereof to the said *Mc Neil*, his heirs, &c. on request; and all the residue of said estate, which may be unsold at the time of accounting as aforesaid, shall also be reconveyed to the said *Mc Neil*, his heirs &c.; excepting however any and all incumbrances, whereby the said *Mc Neil* is to be benefited by having the amount, for which the same may have been incumbered, applied to the discharge of his debts, as herein provided. The said *Magee* to retain sufficient property to pay all reasonable expenses he may incur, in all negotiations in said property, and a just and fair compensation for his own time and trouble." This agreement was not recorded until the 25th of September 1609. There was a correspondent agreement executed by *Mc Neil* to *Magee* on the same day, giving *Magee* a like election to give up the purchase on the same terms, *mutatis mutandis*.

Difficulties, as might naturally be expected, soon grew up between the parties in the execution of the trusts thus generally created, and carrying in their own bosom the elements of discord.

On the 13th of April 1811, *Mc Neil* and *Magee* entered into an agreement under seal, by which they submitted all claims and demands growing out of the deeds and contracts aforementioned, or otherwise, to three arbitrators, and covenanted to abide by any award, which they or any two of them should make in the premises, under a penalty of \$50,000. It was specially covenanted, that for any sums of money which the arbitrators should award to *Magee* for expenditures, services, &c. he (*Magee*) should take in payment and satisfaction such portion of the lands conveyed to him, as the arbitrators should award; and that the arbitrators should make a valuation of the lands conveyed, and award what portion should be conveyed to *Magee*, and what to *Mc Neil*, and describe the same accordingly, and state the time when the deeds necessary to carry their award into effect should be executed; and that *Magee* should reconvey all the rest and residue to *Mc Neil* in fee simple, *free of incumbrances by him made*; and that *Mc Neil*, on receiving such conveyance, should release to said *Magee* all right, title, claim, and demand, in law and in equity, as to the portion of said land, which should remain to *Magee*, and be by him held. The promissory notes were to be deposited with the arbitrators; and upon delivery of such deed to *Mc Neil*, or tender of delivery, the said notes were to be given up to *Magee*.

The arbitrators, after many hearings of the parties, on the 21st of May 1811 made their award. By it they awarded, that a balance of \$27,100 was due from *Mc Neil* to *Magee*. They then proceeded to state their valuation and division of the lands conveyed, describing the same specifically, and awarded one portion, equal in value to \$27,100, to *Magee*, and the other portion thereof, equal in value to \$2832, to *Mc Neil*. They further

awarded, that *Mc Neil* should within twenty days execute a deed or deeds of release to *Magee*, with covenants of warranty against incumbrances made by him, and of all lawful claims of persons claiming under him, as to the lands awarded to *Magee*. And that *Magee* should execute within twenty days a deed or deeds of gift, grant, bargain, sale, and release, to *Mc Neil*, of all the land awarded to him, with like covenants of warranty.

On the 18th day of August 1811, *Magee* tendered a deed to *Mc Neil* duly executed and acknowledged by him, (*Magee*,) of the land awarded to *Mc Neil*, in conformity to the terms of the award; and at the same time requested *Mc Neil* to execute and acknowledge a deed of the lands awarded to him, (*Magee*,) which deeds were drawn up in conformity to the award. *Mc Neil* refused to receive the deed executed and acknowledged by *Magee*, and also to execute the deed prepared for him to execute to *Magee*.

A suit was brought by *Magee* against *Mc Neil* at the January term of the Court of Common Pleas for Suffolk County, 1812, for the penalty in the submission, to enforce the award. At the September term of the same Court in 1812, a suit was brought by *Mc Neil* against *Magee*, upon the notes given for the \$40,000 purchase money. Both of these suits were brought to a decision at the March term 1814, of the Supreme Court of the State of *Massachusetts*, the first upon a demurrer to special pleadings; and the last upon an agreement of facts by the parties, bringing the validity of the award before the Court. After a hearing and due proceedings had, the Court appear to have adjudged the award good, as a bar to the suit upon the notes; and the other suit was decided in favour of *Mc Neil* upon the pleadings, the plaintiff's replication being adjudged to be bad and insufficient.

In the years 1813 and 1814 *Magee* sold the lands awarded to *Mc Neil*, for various considerations, to certain of the defendants; and in December 1814 he mortgaged the lands awarded to himself, (excepting that part, which had been mortgaged to *Marga-*

ret Magee) to Simon Eliot for a large sum. By subsequent assignments, the same lands so conveyed to Eliot came into the hands of Amos Binney; but whether the equity of redemption had been foreclosed did not appear by any of the proofs in the cause. But it did appear, that Mc Neil in June 1819, for the nominal consideration of \$1, released all his title in the same lands to Binney.

To this summary of the leading facts it may be necessary, for a more full understanding of the case, to add, that the original bill was commenced at May term 1823 against James Magee, and against sundry other persons claiming portions of the land as purchasers &c. under him.

The original bill was founded solely upon the deeds of Mc Neil to Magee, and the collateral agreements between them. After stating the substance of those instruments it charged, that on the 15th of October 1810, Mc Neil became dissatisfied with the said security for the purchase money, and required a reconveyance of the lands then unsold from Magee; and that Mc Neil did then and afterwards offer and tender to Magee his notes, and to account for and repay all sums of money paid by Magee on his notes, and on the debts of Mc Neil, and to permit Magee to retain sufficient property to pay all his reasonable expenses and a just and fair compensation. It then charged, that Magee, confederating with the other defendants, refused to reconvey, and that he made divers conveyances to his confederates, &c. under which they had entered and occupied; and then prayed for a discovery and account, and a delivery of possession of the lands, or of so much thereof, as he was equitably entitled to, and for further relief.

Margaret Magee (one of the defendants) died in July 1822, and James Magee died in December 1823. Their deaths were accordingly suggested on the record. A bill of revivor was filed at May term 1824 against the administrator of Margaret Magee, upon which process was duly issued.

In January 1825 the bill was amended in several particulars. The amended bill, among other things, stated, that *James Magee* was dead, having at that time no goods or estate whatsoever; and that the agreement of 1808 was recorded in September 1809. It added other parties, as defendants to the bill, with apt words to charge them as purchasers under *Magee*. It then proceeded to state certain pretences, under which the confederates claimed title, denying the same; and, among other things, stated, that they set up the submission and award before mentioned, and the refusal of *Mc Neil* to comply with the same. It admitted the existence of the submission and award, but charged that the arbitrators had no authority to award a deed of any particular form, or containing any particular covenants to be made by *Mc Neil* to *Magee*; and that the arbitrators exceeded their authority in prescribing such form of the deeds to be given by *Mc Neil* and by *Magee*; and further, that the award was not pursuant to the submission in another respect, inasmuch as it did not fix the day, on which the deeds should be delivered by the parties, nor that *Magee* should *first* make, execute, and deliver to *Mc Neil* a deed of the lands set off to him, nor make any award respecting the notes; and that on these accounts it was null and void. But if valid, it charged, that *Magee* did not execute the proper deeds, nor were the lands free of incumbrances made by *Magee*; and that a delivery of such deed of the lands, free of incumbrances, was a *condition precedent* to any act to be done by *Mc Neil*, and that *Mc Neil* is now entitled to the lands so set off to him. It then charged, that the confederates had notice of the conditions and trusts, on which the lands were held by *Magee*, and of the award, and of the title of *Mc Neil*, &c. at the time of their respective purchases. It then stated another pretence, *viz.* that a large portion of the lands was mortgaged to one *Simon Eliot*, and by him assigned to one *Amos Binney*, to whom afterwards *Mc Neil* released all his right and title; and charged, that a part only of such lands contained in the original

deeds was so conveyed, and that the mortgage had been paid off and satisfied.

The amended bill then stated, that a part of the lands (to some of which *Samuel Jaques*, one of the defendants, claimed title) was mortgaged by *Mc Neil* to *Margaret Magee*, the defendant, on the 28th of August 1801, as security for \$7000, with power to sell; and on the 28th of August 1807 was again mortgaged by *Mc Neil* to her for \$7000, and that it was pretended, that she took peaceable possession for non-payment, and continued the possession until the 29th of March 1811, and then granted the premises to *James Magee* in fee, who then executed a deed of covenant to reconvey the same to her on request; and that afterwards, on the 15th of October 1813, he did reconvey the same to her in fee, and that the mortgage money was never paid, and the mortgage was thereby foreclosed. It charged on the contrary, that the mortgage money was paid, and the mortgages ought to have been discharged; that there was no foreclosure or possession as pretended, &c.; that these conveyances and release by *James Magee* to the said *Margaret* were without a valuable consideration, and she at the time well knew, that he held the equity in the same lands upon the conditions and trusts abovementioned; and had no right to give such a release.

At May term 1827, a bill of revivor was filed to revive the cause against *Simon E. Greene*, administrator of *James Magee*, who subsequently appeared, and filed an answer. At May term 1828, upon motion of the plaintiff the bill was dismissed as to *Margaret Magee* and her representative, and her name was struck out of the bill. And the like dismissal took place as to *Jonathan Amory*, one of the defendants, who died pending the proceedings.

The general replication having been filed, the cause was, by the consent of the parties, set down for a hearing at October term 1828; and upon breaking the argument, it having been intimated by the Court, that the decision of the State Court was

conclusive as to the objections taken to the validity of the award, a motion was then made to amend the bill, so as to confine the relief prayed for to that parcel of the lands, which had been assigned by the award to *Mc Neil*. The motion was somewhat irregular; but under the peculiar circumstances of the case was allowed, as it would not occasion any further delay.

The bill was then amended by confining the relief prayed for to the lands so awarded to *Mc Neil*, and by striking out all that portion of the bill, which stated objections to the validity of the award. And the bill was treated, as if it stood dismissed by consent against all the defendants, except *Magee's* administrator, and the defendants, who made claim to the lands so awarded to *Mc Neil*.

Such is the posture of the case, as it was presented at the final argument; and it has been necessary to detail the proceedings somewhat at large in the order of time, that the pressure of some of the points made at the bar may be fully comprehended.

It is obvious, that the case made by the original bill has been abandoned. That case proceeded mainly upon the ground, that *Mc Neil* had become dissatisfied with his security in the notes for the purchase money; had notified that fact to *Magee*; had offered a full compliance, on his own part, of the terms and conditions, on which he was entitled to a reconveyance; and had demanded a reconveyance in October 1810. His dissatisfaction is established, or rather admitted; but his compliance with the terms, on which he was entitled to a reconveyance, is not only not established, but is at war with the proofs in the cause. And no notice of that dissatisfaction, as averred, has been brought home to the purchasers under *Magee*, unless it be since the promulgation of the award.

But if it had been otherwise, the subsequent submission and award, supposing the latter to be valid, would completely displace all equitable relief founded merely upon the original agreement in 1808. The validity of the award was effectually decided by

the State Court ; and the subsequent amendment of the bill puts the right to relief upon the ground of the award ; and, therefore, the case is now narrowed down to the consideration of the bill, as it stands connected with that award, and the accompanying facts.

The questions, then, presented to the Court for decision, ultimately resolve themselves into the following points. In the first place, whether the plaintiff would now be entitled to the relief prayed for upon the case made by the pleadings, and proofs against *Magee* himself, if living ? If he would be so entitled, then, whether, under all the circumstances, the plaintiff is entitled to the relief sought against the defendants, who are purchasers of the lands under *Magee*.

Upon the first point the defendants have taken several objections to any relief, even against *Magee* himself.

The first objection is founded upon the statements of the amended bill itself, the award being made a part of that bill. It contains no allegation of any compliance with the terms of the award on the part of *Mc Neil*, by his executing a deed of release, as therein required of him, nor of any tender of performance on his part. But it sets up as an excuse, that a delivery of a deed of the lands awarded to *Mc Neil*, free of any incumbrances by *Magee*, was a condition to be performed by *Magee*, precedent to any act on the part of *Mc Neil* ; and that *Magee* never executed, or tendered any such deed ; and that the lands so to be conveyed were not, at any time after the award, free of incumbrances. The objection is, that the award creates no such condition precedent ; and therefore the plaintiff is not entitled to the relief he seeks, since there has been a total failure on his part to comply with the terms of the award.

Upon examining the award, it does not appear to me, that there is any ground for the suggestion, that the delivery of the deed by *Magee* was in that instrument made a condition precedent, as asserted in the bill, whatever might be the case standing

upon the terms of the submission. Both deeds were to be executed and delivered within twenty days from the date of the award. There is nothing in the nature of the act to be done, which implies any priority on either side. And if any conclusion could be drawn (as I think it could not be) from the mere order, in which the acts are stated in the award, *Mc Neil* would be to perform the first act, since his act is first named. And as *Magee* was in possession of the legal title, which, by the terms of the original agreement in 1808, he had a right to hold, until he was fully indemnified and paid for all his advances, no inference can be deduced, that the arbitrators intended to diminish his security, until his indemnity was complete. The natural reasoning from the posture of the parties antecedent to the submission would be in favour of *Magee*, and that *Mc Neil* was to do the first act. But it appears to me, that the true view of the matter even at law is, that they are concurrent, or dependent acts; and that neither party had a right to demand a performance of the other, without a performance or tender of performance at the same time on his own part. If the case had been of mutual covenants to execute deeds, within the twenty days, of the lands awarded, neither party could in my judgment have recovered at law for a breach, without such an averment of performance. The one act would constitute the consideration for the other. It would be repugnant to all justice to require, that *Mc Neil*, refusing to perform his part of the award, should yet be entitled to demand a surrender of the legal title to the lands awarded to him from *Magee*. The submission does, indeed, contain a clause, which might be construed to require a prior performance by *Magee*, before *Mc Neil* would be in default on his covenant. The language there is, that *Magee* shall reconvey the land awarded to *Mc Neil*, and that *Mc Neil*, "*on receiving such conveyance, shall release to Magee all right, &c. to the portion of said land*" awarded to *Magee*. But it appears to me, that the true construction of the submission, taking into view its whole objects and

terms, is that, which the arbitrators gave to it, that is to say, that the acts should be concurrent. *Magee* was to give a conveyance on receiving a release from *Mc Neil*, and *Mc Neil* was to give a release upon receiving a conveyance from *Magee*. The acts were to be concurrent, and to be executed at the same time. It was like the common case of covenants on a purchase, where one party covenants to give a deed on receiving the purchase money, and the other party covenants to pay the money on receiving the deed. In such a case, neither can recover at law without showing a performance, or tender of performance, on his part. It is not necessary to go into an examination of the cases at law on this subject, though the cases cited at the bar, and especially *Glazebrook vs Woodrow*, (8 Term. Rep. 366,) are strongly in point.¹ The general principles, by which questions of this sort, arising under agreements, are construed, are the same both at law and in equity. Where there are mutual covenants or acts, they are construed to be dependent, unless a contrary intention appears;² and there is good sense as well as practical convenience in the rule.

But it is the less necessary to sift this matter minutely, because we are in a court of equity; and in such a court, he who seeks equity must do it. Now, the specific performance of a contract by a Court of equity is not a matter of course, but rests in the sound discretion of the Court; not, indeed, in an arbitrary discretion, but such as rests upon grounds of justice.³ It may be refused, whenever there are circumstances, which show it to be inequitable or improper; and the party is then left to his remedy

¹ See also 1 Saund. R. 320, note 4.—*Sugden Vendors*, ch. 4, § 8, p. 227.—1 Fonbl. Eq. B. 1, ch. 6, § 1, and notes.

² *Sugden Vendors*, ch. 4, § 3.—*Bank of Columbia vs. Hagner*, 1 Peters Sup. Rep. 455, 465.

³ Com. Dig. Chancery, 2 C. 16.—*Sugden Vendors*, ch. 4, § 2.—*Goring vs. Nash*, 3 Atk. 186.—*Joynes vs. Statham*, 3 Atk. 387.—*Davis vs. Symonds*, 1 Cox R. 402.—*Seymour vs. Delancy*, 6 Johns. Ch. R. 222.

at law. And it may be laid down as a general rule, subject to few, if any, exceptions, that where specific performance is sought, the Court will require the party, who seeks it, to show a performance or readiness to perform, on his own part, or a default on the other side, which utterly excuses him.⁴

In respect to awards, whatever may have been the case formerly, no doubt at present exists, that courts of equity have jurisdiction to enforce a specific performance of them. But the ground is, that it is but an execution of the agreement of the parties, ascertained and fixed by the arbitrators.⁵ So that the case falls clearly within the general rule laid down as to performance, where a specific execution is sought. The doctrine is well summed up in Mr. *Fonblanque's* Treatise on Equity, in the text and notes. (B. 1, ch. 6, § 1, 2.) The case of *Ewes vs. Blackwall* (*Rep. Temp. Finch.* 22) goes farther; and seems to assert a principle, that unless the party seeking relief has strictly performed the award on his part, the other shall be let in to every equity without any regard to the award. Whether it can be supported to this extent, it is unnecessary now to consider; and the case (which is very imperfectly reported) may well have stood on its own peculiar circumstances.

In this view, the case of the plaintiff is surrounded by some difficulties. The bill does not, as has been already suggested, aver any performance or tender of performance, or even a present readiness to perform, on the part of the plaintiff, the requisitions of the award. The excuse for non-performance, as we have already seen, fails in point of law. There was no condition precedent on the part of *Magee*; and if there had been, I should

⁴ 1 *Madd. Ch. Pr.* 331.—*Colson vs. Thompson*, 2 *Wheaton R.* 336.—1 *Fonbl. Eq. B.* 1, ch. 6, § 1, 2, and notes.

⁵ *Hall vs. Hardy*, 3 *P. Will.* 187.—*Norton vs. Mascall*, 2 *Vern.* 24.—*Blundell vs. Brettargh*, 17 *Vez.* 232.—*Wood vs. Griffith*, 1 *Swanston R.* 43, 54.—*Bishop vs. Webster*, 1 *Eq. Abridg.* 51.—*Thompson vs. Noel*, 1 *Alk. R.* 60, 62.

very much doubt if in a court of equity, under circumstances like the present, the plaintiff could entitle himself to a decree for specific performance, without showing an ability and an offer to perform on his own part. But I should have no doubt, that if entitled to any decree, it ought to be a conditional one only, that is, a decree stipulating for a performance on his part, *eadem flatu*, as one of the terms of the decree. It by no means follows, that because *Magee* might not be in a condition to demand a specific performance, the plaintiff might have it without complying with the terms of the award. But passing by these considerations growing out of the frame of the bill, let us advert to the objections founded on the merits of the case, as against *Magee*, as they are disclosed upon the answers and proofs.

Some commentary has been made at the bar upon the nature and effect of the deeds and agreements in 1808. It has been said, that taking the whole together the transaction amounts to a mortgage to *Magee* with a power to sell. Putting it in the light contemplated by the parties upon the face of the instruments, the transaction seems rather to have assumed the character of a conditional purchase with an election in either party, by notice, to convert it into a conveyance on trust to reconvey to *Mc Neil*, he discharging all the claims of the other party, all the estate undisposed of by *Magee* at the time of such notice. But independent of such notice, *Magee* had an unlimited and absolute power of disposal, of all the property conveyed, in respect to third persons. The submission and award converted the conditional purchase into an absolute title in *Magee*, as to all the lands awarded to him, and as to the residue, awarded to *Mc Neil*, converted *Magee* into a trustee of the latter. After that award, he certainly had no power to give a good title in the trust property to any person having notice of the trust. What is sufficient notice, will become matter of subsequent inquiry.

It is clear, that on the 18th of August 1811, *Magee* did tender a deed, with the proper covenants, to *Mc Neil*, of the lands

awarded to the latter. This is conclusively established by the deposition of Mr. *Welsh*. And it appears by the same testimony, that *Magee* at the same time tendered to *Mc Neil* the correspondent deed of release to be executed by the latter, which he utterly refused. There is no proof that any tender of performance had been made on either side within the twenty days prescribed by the award, although there is an averment of performance by *Magee* within the time, in the answers of his administrator. It is asserted in the amended bill in somewhat loose and general terms, that *Magee* never did tender any such deed, and that the lands were not at the time of making the award, or at any time afterwards, free of incumbrances made by *Magee*. And this averment is connected with the assertion, that this was a condition precedent to any performance on his part. But this is an evident afterthought. There is not the slightest proof, that the refusal of *Mc Neil* originally proceeded upon any such ground. If he meant to rely upon it, it was his duty to have stated it at the time, for it was an objection capable of being removed; and if he had been willing to confirm and execute the award, on his part, there is scarcely a doubt that it would have been removed. The subsequent history of the case demonstrates, that *Mc Neil* never meant to comply with the award. He was dissatisfied with it. He contested its validity in the State Court. He did not allude to, or admit, it in his original bill in 1823. When he stated its existence in his amended bill, it was mainly for the purpose of denying its validity; and down to the time of the last amendment in November 1828, he never founded his title to relief exclusively upon it as a valid award. In short we cannot escape from the conclusion, that he never meant to perform it, if he could overthrow its authority; and in acceding to it now, he yields only to the force of circumstances, and the operations of law upon his title. Doubtless he had a right so to do; but in every such case a party must act at his peril, and must submit to those consequences, which his own de-

lay and refusal unavoidably introduce in the way of relief. Now, nothing is better settled than that a court of equity will not interfere to decree a specific performance, where the party seeking it has been guilty of gross laches, or long voluntary delay, and in the meantime there has been a material change of circumstances. The party will be left to take his remedy at law, where the delay or neglect has been without just excuse, and there is no longer a prevailing and decisive equity to sustain his claim.⁶ This is true not only as to agreements generally, but as to awards founded upon agreements, for equity interferes in respect to awards, only as growing out of agreements.⁷ If therefore a court of equity perceives, that the delay, voluntary on the part of the party seeking a specific performance, has been very injurious to the other party, so that it would be inequitable to decree a specific performance, that alone is sufficient to induce the Court to withhold its aid.⁸

It has been further suggested, on behalf of the defendants, that the plaintiff has disabled himself to comply with his part of the award, for he has released his equity in the lands awarded to *Magee*, to *Binney*, who is a purchaser claiming by a mesne conveyance, under the latter; and therefore a release to *Magee* afterwards became impracticable, in the sense of the award, since it would have been inoperative in point in law.

There is some force in the objection; but whether to the extent, which the objection assumes, may admit of doubt. It cer-

⁶ See 1 *Madd. Ch. Pr.* 329, 330, 331.—*Sugden Vendors*, ch. 8, § 1.—2 *Powell on Contracts*, 19, 22, 260.—*Hayes vs. Caryll*, 1 *Brown Parl. Cas.* 27.—*Van Benthuyssen vs. Crapser*, 8 *Johns. R.* 257.—1 *Fonb. Eq. B.* 1, ch. 6, § 1, 2, 12.—*Harrington vs. Wheeler*, 4 *Vez.* 686.—*Alley vs. Deschamps*, 13 *Vez.* 225.—*Wright vs. Howard*, 1 *Simon and Stuart*, 190.—*Parker vs. Frith*, *Id.* 199 n.—*Pratt vs. Carroll*, 8 *Cranch*, 471.

⁷ See 1 *Bac. Abridg. Arbitrament and Award*, l.—*Cald. Arbit.* ch. 7, p. 172.—*Kyd on Awards*, 322.—3 *P. W.* 187.—17 *Vez.* 232.—1 *Swanst.* 43, 54.

⁸ See *Crofton vs. Ormsby*, 2 *Sch. & Lefr.* 582.

tainly however cannot be admitted that *Mc Neil* could, in this manner, discharge himself, by his own act, from a strict compliance with the terms of the award. His release to *Magee* would operate at least as a confirmation of the absolute title of *Magee* in the land ; and in this respect would be material to the covenants of warranty on any sale made by the latter. It is not denied, that *Mc Neil* did make a release, as stated, to *Binney*, in the year 1819 ; though it purports on its face to be for the nominal consideration of \$1 only. The procurement of such a release, even at that late period, shows, that at least in the mind of the purchaser, the title was not absolutely perfect, and free from doubt. But it is the less necessary to dwell on this view of the matter, because there is one of far more importance pressing on the case, and which can never be lost sight of by a court of equity. It cannot admit of doubt, that the omission of *Mc Neil* to give the release required by the award, must have materially affected the marketable value of the property awarded to *Magee*. If the existence of the award, and of *Mc Neil's* dissatisfaction with it, and refusal to ratify it, were half as notorious as the plaintiff now contends it was, it must have materially injured any sale by *Magee*. No cautious purchaser could incline to take a title then in dispute, and over which such a cloud hung, unless at a sum far below its real value. The sum due to *Magee* was \$27,100, and his whole means of reimbursement were exclusively confined by the award to the lands estimated at that value. The estimate of the arbitrators proceeded upon the ground, that *Magee* should possess an indisputable title. Its marketable value was essentially connected with the existence of such a title. A prompt compliance with the award on the part of *Mc Neil* was indispensable for this purpose ; and every delay on his part was injurious to *Magee*. Mr. *Welsh's* deposition shows, that *Magee* offered at the time to give up the lands to *Mc Neil*, for \$5000 less than the sum for which they were set off to him ; and *Mc Neil* was unwilling even to offer for them more than

\$20,000. All these lands (excepting those mortgaged to *Margaret Magee*) were mortgaged to *Simon Eliot*, by *Magee*, in December 1814, (more than three years after the award,) as security for \$9800, and for other purposes, with a power to sell, and subject to a prior incumbrance to *Jonathan Amory*, in March 1809, for \$3000 and interest. By subsequent assignments and conveyances, the whole became vested in *Amos Binney*; but there is no evidence of the exact amount realized therefor. But from the silence of all parties on this head, connected with the averments in the answers, and other circumstances in proof, there is no reason to presume, that it exceeded the mortgages. So that, at the utmost, the available proceeds of the lands awarded to *Magee*, (including the premises mortgaged to *Margaret Magee*,) so far as they can be traced, may be presumed not to have exceeded the sum of \$22,550. In fact, the answer of *Magee's* administrator avers, that there was a loss to *Magee* of \$5000 exclusive of interest. In what manner this depreciation was occasioned, it would perhaps be difficult, if not impossible, at this distance of time, precisely to ascertain. But we have a right to presume, that the land was in 1811 worth the full amount at which it was estimated by the arbitrators. It did not realize that amount when sold. The loss (whatever it was) actually fell upon *Magee*. This Court has no right to say, that the same loss would have occurred if *Mc Neil* had punctually, when he was requested, executed the release. The original offer of *Magee* to take \$5000 less than his claim, is no proof that the land was not at that time worth the full sum awarded, for it probably was an offer to buy peace; and at all events it demonstrated, that a prompt realization of the value of the lands was, in *Magee's* own view, of great importance to his interest. In fact, if the Court were compelled to judge of the injury to *Magee* by the imperfect facts before it, it would not be an irrational conclusion, that the refusal of *Mc Neil* up to the sale in 1814, had worked an injury to *Magee* exceeding the full value of the lands award-

ed to *Mc Neil*. He was entitled to a perfect, unclouded title, in a time of peace; and he was compelled to sell the lands, without any such benefit, in a time of war. Indeed, the argument from the defect of title, is pressed upon the Court under another aspect by the plaintiff's counsel, against the defendants now in this cause; and it is urged, that they purchased cheaply from the very circumstance that there was a cloud upon the title. They purchased for \$3300, upon the face of their deeds, though, from some unexplained circumstance, I find it stated in the answer of the administrator, that *Magee* realized no more than \$2600.

The answer of the administrator relies upon this delay and refusal of *Mc Neil*, as a justification of *Magee* in selling the lands awarded to *Mc Neil* to indemnify himself for his losses and damages. Now, this Court certainly cannot justify such a procedure. It is no excuse for *A*, that he sells *B*'s lands, because *B* has injured him to an extent equal to their value. The act is, in point of law, utterly indefensible. But when a court of equity is asked to compel a specific performance in a case of injurious delay, voluntary and unjustifiable on the part of him, who seeks the aid of the court, it is bound to look at that fact, and to consider, whether it ought to be active in his favour. It has a right under such circumstances to say, that it will leave the parties to their respective remedies at law for mutual damages, rather than hazard a decree, which might administer justice only on one side.

But to this presumption of loss and injury, there are to be added the lapse of time, and laches of the plaintiff, and a material change of circumstances in the intermediate period. Twelve years elapsed after the award, before the original bill was filed. Five years more, before the plaintiff admitted the validity of the award, and, by an amendment, confined his claim to the title derived under it. *Magee* died in 1823 insolvent, and before he had made any answer to the bill; and the equities between him and *Mc Neil* are now to be ascertained and litigated by persons, who are utter strangers to all the original transactions.

Now, I have not been able to find a single case, where a court of equity has decreed a specific performance under circumstances like the present. Lapse of time is sometimes overlooked, but only when there has been reasonable diligence by the party seeking a decree; or, as some of the cases say, where "he has shown himself ready, desirous, prompt, and eager."⁹ Laches may be excused; but it must be under strong controlling circumstances.¹⁰ But where a party has perseveringly, through a course of years, resisted the performance of an agreement, denying its validity; where he has taken no step towards a performance on his own part, and has repelled the advances on the other side, no case can, as I believe, be found, at least in modern times, in which a court of equity has interfered in his favour. Especially will such a court be disinclined so to do, where the other party has expressed a willingness to perform; where a presumed injury has arisen to him from the lapse of time; where the rights of third persons have intervened; where the circumstances of the parties have changed; and where death and insolvency have materially affected the remedy, which third persons may have in the premises, in respect to their own grantor.

It is no sufficient answer, as has been already intimated, that *Magee* was unable at the time to give a deed free of his own incumbrances. The objection was not insisted on at the time, and was capable of being removed. The award itself provided a remedy by the covenants in the deed to secure the party against any such incumbrances; and at law the existence of incumbrances would not have been fatal to the award. I do not say, that a court of equity would not upon an early application have given relief in such a case; and would not have withheld a specific performance from *Magee*, until he had removed those

⁹ *Milward vs. Earl Thanet*, 5 Vez. 720, note.—*Sugden Vendors*, ch. 8, § 1.

¹⁰ *Sugden Vendors*, ch. 8, § 1.—*Benedict vs. Lynch*, 1 Johns. Ch. R. 370.

incumbrances ; or upon the application of *Mc Neil* would not have decreed him a compensation or indemnity *pro tanto*.¹¹ But the remedy of *Mc Neil* was just as perfect then, as it ever could be ; and his long delay had a natural tendency to aggravate every evil on the other side. At this distance of time, when *Magee* himself is dead, it is not in the power of any court of equity to ascertain with exactness the amount of injury to *Magee* by that delay. And it is not the habit of courts of equity to decree compensation in cases of specific performance for mere laches or delay ; but compensation is usually, if not invariably, decreed upon other distinct grounds.¹²

Upon this point of the case, therefore, if the question were, whether *Magee* himself, being before the Court, as sole defendant, ought to be compelled to a specific performance at such a distance of time, under all the circumstances, there would be much room for hesitation. How could this Court assume, that he had not been damnified by the delay, and refusal to perform the award ? If damnified, in what manner is this Court to exercise jurisdiction to decree compensation ; and how is it to measure the damages ? But *Magee* having sold, and the interests of third persons having intervened, it is plain, that no decree for a specific performance can operate, except through a vendee's holding the title. The question then, even if *Magee* were living a co-defendant, would become far more complicated and difficult. A decree on the part of the Court for a specific performance would require it to interpose its active aid to strip these vendees of their title and possession in favour of a party, who had chosen to lay by for a great length of time, and had exhib-

¹¹ See *Sugden Vendors*, ch. 6, § 1.

¹² See *Mc Alpine vs. Swift*, 1 Ball & B. 285.

¹³ See *Sugden Vendors*, ch. 6, § 1.—*Halsey vs. Grant*, 13 Vez. 73.—*Horniblow vs. Shirley*, 13 Vez. 81.—*Binks vs. Lord Rokeby*, 2 Swanston R. 222.—*Bolmanno vs. Lumley*, 1 Vez. & B. 224.—*Paton vs. Rogers*, 1 Vez. & B. 351.—*Wood vs. Bernal*, 19 Vez. 220.—*Sugden Vendors*, ch. 8, § 1.

ited no legal, or reasonable diligence. I will not attempt to disguise, that I should feel the most serious difficulties in arriving at such a decree, even if the vendees had the most unequivocal notice of the plaintiff's equity.

But let us see how the case stands as to the vendees now before the Court, not only in respect to notice, but to the equities, which are set up by them in their defence.

In the first place as to notice. The defendants claim under a registered title from *Magee*, whose title is also registered. The plaintiff originally claimed under the agreement of 1808, which was not registered until more than a year and a half afterwards. He now claims under the award, which has never been registered at all. In each case his claim is to an equity. Now, it is the settled doctrine, that under such circumstances, where relief is sought against a purchaser, there must be clear and undoubted notice; and that suspicion, even strong suspicion, is not sufficient.¹⁴

It is contended in the first place, that the defendants had constructive notice of the original agreement from its registry, although not referred to in the conveyances to *Magee*; and that its contents were sufficient to put them upon inquiry. Unless that agreement was properly matter for registry under the *Massachusetts* statutes of registry, there is no pretence to say, that it was constructive notice to any person.¹⁵ Now I very much doubt, whether the agreement, disconnected as it was from the conveyances, was proper matter for registry under the act of 1783, ch. 37, or the act of 1802, ch. 83. The agreement was not in any legal sense a defeasance. It was not intended wholly to defeat the conveyances in a given event. Nor was it an in-

¹⁴ *Sugden Vendors*, ch. 16, § 5, art. 4.—*Hine vs. Dodd*, 2 Atk. 276.—*Hyatt vs. Barwell*, 19 Vez. 439.

¹⁵ See *Morecook vs. Dickens*, Ambler R. 678.—*Latouche vs. Lord Dunsany*, 1 Sch. & Lefr. 137, 157.—*Sugden Vendors*, ch. 16, § 5, art. 4.—*Frost vs. Beckman*, 1 Johns. Ch. R. 288.—*Heister vs. Fortner*, 2 Binn. R. 40.

cumbrance on the estates conveyed. On the contrary, it was the intention of both parties, that *Magee* should have a complete power to make absolute titles to purchasers ; and in the event of notice to him of dissatisfaction, he was to reconvey the lands remaining unsold by him, and account for all sales and purchases antecedently made. I do not know that it has ever been held under these acts of registry, that a collateral, disconnected agreement between the parties, merely affecting the title to lands, must be registered.

But supposing it otherwise ; still the agreement itself admits the right of *Magee* to make sales, until it is rescinded by a notice of the dissatisfied party ; and such notice is independent of the record, and must be established by competent proofs, *aliunde*. No such proofs exist in this case. *Magee*, at the time of the sale, was in possession of the legal title. The deed, under which he claimed, contained no reference to any collateral agreement. He had a right to sell ; and no purchaser was bound to make inquiry, whether there had been any revocation of such right. The existence of the right was fairly presumable, until notice of the contrary was given by *Mc Neil*, either personally, or by some act of public notoriety.

Then as to the award, it was never registered ; nor was it in fact entitled to registry. Notice of its existence therefore must be established by matter *in pais*. The defendants positively deny in their answers, that they had notice of any legal or equitable title in the plaintiff, at or before their respective purchases, or of the award itself, until the commencement of the present suit. The answers do not, as technically they should, deny notice at the time of the payment of the purchase money. But no exception has been taken to them on this head ; and it may be fairly presumed, that they paid the money at the time of their purchases. They add, that *Mc Neil* must have known, that after the purchases, the defendants were going on, making valuable improvements on the lands ; and yet that he never gave them

any notice of his title ; and in this respect suffered them to be misled. Against these positive denials in the answers, there ought to be strong evidence of notice to overturn their force.

The evidence of notice adduced on behalf of the plaintiff, with a single exception, is founded upon the notoriety of the submission and award, and the disputes about the title between *Mc Neil* and *Magee* in *Charlestown*, where the lands lie, and the defendants lived at the time of their purchases. To give the evidence any application, it should distinctly point to the period of the purchases, or payments of the purchase money. Any notoriety at a subsequent time cannot invalidate rights antecedently vested. There is abundance of testimony, that of late years there has been in *Charlestown* an extensive, if not a general, notoriety of some claim of title to the lands by *Mc Neil*. The exact manner, in which that claim of title was asserted by *Mc Neil*, whether under the award or otherwise, was not as well defined, nor marked with so much notoriety. It appears, however, to have created sufficient alarm in the minds of some of the purchasers under *Magee*, to induce them to obtain, for valuable considerations, quitclaims from *Mc Neil*. But the difficulty is, to trace back that notoriety to a period antecedent to June 1814, that being the latest period at which any sale of the lands awarded to *Mc Neil* was made by *Magee*. *Fosdick* purchased in June 1811 ; *Wheeler* purchased one parcel of land in June 1813, and another in June 1814 ; *Adams* purchased in November 1813 ; and *Collier* purchased in April 1814. These purchases include all the lands awarded to *Mc Neil*, except a strip, which has been appropriated as a street, called *Lawrence street*. Much of the testimony, as to the time of the notoriety, is quite loose and unsatisfactory ; and that which approaches nearest to the period of the purchases is not exact, and does not (with one exception) fix personal notice upon any of the purchasers from *Magee*.

That it is strong enough however, to be left to a jury to infer notice, may be admitted ; but this, in a court of equity, is not suffi-

cient to outweigh the direct denial of an answer. There must at least be one positive witness, and cogent circumstances in support of his testimony, to enable a court of equity to overrule the effect of such an answer. Now the inference, generally deducible from notoriety, is in the present case somewhat shaken by the fact, that numerous witnesses, living in the same town and neighbourhood, were ignorant of the claim of *Mc Neil* and of the award, until a comparatively recent period before the commencement of the present suit. This ignorance it is difficult to account for, unless upon the supposition, that the notoriety was far less than some of the other witnesses suppose. And at all events it demonstrates, that a purchase might well have been made without actual or constructive notice. To this extent it fortifies the denials of the answers. What adds some confirmation is, that almost all of the purchasers have since made valuable improvements and erections on their estates, and that *Mc Neil*, though living in *Charlestown*, or its vicinity, during this period, has suffered these improvements to go on, without, as far as the Court can learn, ever having given personal notice or warning to any of the purchasers. The answers of the defendants put this fact sufficiently before the plaintiff to have drawn forth some evidence on this head, at least to repel the claim for improvements, if it could have been fairly rebutted. And I cannot but think, that the testimony of Mr. *Holden*, one of the arbitrators, who resided in *Charlestown*, is entitled to some consideration, in the statement which he makes, that the rumour or report of the award, and that a quitclaim was necessary from *Mc Neil*, was not, to his knowledge, current in *Charlestown*, until two or three years after the award was made, when purchases began to be made of lots of the land. In respect, therefore, to the purchasers generally, although there is strong evidence of the notoriety, sufficient to raise a just suspicion of notice, I cannot say, that according to the rules of a court of equity it is so strong, as to put the stamp of falsity upon the direct denials of the answers.

The exception, to which allusion has been made, is the testimony of Mr. *Sawyer* in respect to the purchase made by the defendant, *Adams*. This witness testifies to a conversation with *Adams*, soon after his purchase, under circumstances so peculiar, that it is difficult to resist the belief that *Adams* had notice at the time of his purchase, if the credibility of the witness is not impeached. It is true, that the witness is manifestly mistaken as to time, for he puts the occurrences in 1815 or 1816, whereas *Adams* purchased in November 1813. But such a mistake would not ordinarily be fatal to his general credit. Still, giving the fullest effect to the testimony of this witness, it is but one witness against the positive denial of *Adams's* answer; and I am not satisfied, that the other circumstances do carry with them such positive force, as entitle the Court to disregard that answer.

In respect to *Wheeler*, who was not an original defendant, but who died before he could answer, after he was made a party, I do not find, that it is any where stated directly in the answers of the defendants, that he was a purchaser without notice, though some of the averments seem intended to include him in this predicament, but are not pointedly drawn. It is matter of regret with me, that this omission, which is obviously a clerical slip, should have occurred. The point, which it raises, is somewhat nice and difficult, but upon which, after full deliberation, I have come to a settled conclusion. The point is this,—whether a plaintiff, setting up an *equitable* title against a *legal* title in purchasers, (it may be different, where it is an equity against an equity,) is not bound to aver in his bill, that these purchasers had notice of his title; and if so bound, then, whether he is not bound to prove at the hearing the fact of notice, unless it is distinctly admitted by the answers of the defendants. I think, that he is so bound in both respects. It appears to me, that the legal title is a sufficient protection to the defendants, and that a court of equity cannot displace that title, in favour of a mere equitable title, unless, assuming all the facts stated in the bill to be true, these facts justify

a decree in favour of the equitable title. Now, where the bill itself sets up a legal title in purchasers, an equity does not attach to the estate in their hands, unless they have notice of it. And, therefore, notice must be averred in the bill; otherwise, the plaintiff has no case. It is true, that upon a bill filed calling for a discovery of title from a purchaser of the legal estate, as well as for relief, he may, if he pleases, interpose, as a bar to the discovery and relief, the plea, that he is a purchaser without notice at the time of his purchase, and payment of the purchase money. And in such a case his plea will be bad, without such an averment and denial of notice; and if notice is charged in the bill without a supplemental answer, also denying that notice as charged in support of his plea. But the reason is, that by the plea he sets up a positive bar to all further inquiry and all discovery. If, instead of such plea, he chooses to answer generally and go to a hearing, he may well do so. And in such a case the parties stand exactly as they do in all other cases, that is to say, the plaintiff must prove all the allegations in his bill necessary to establish his right to a decree, unless so far as they are admitted by the answer. If the answer omits to deny the notice charged in the bill, that is no admission of the notice. The plaintiff may object to the answer for insufficiency in this respect, as he may for insufficiency as to any other fact charged. But if he takes no exception, and the cause goes to a hearing upon the general replication, it is a waiver of the exception, and the plaintiff must prove his case. If notice is essential to a decree, he must affirmatively establish it; for that is the whole foundation of equitable relief against the legal title. Some obscurity is thrown over this subject by confounding cases, where a preliminary objection is taken by way of plea, or special answer, as a bar to all further discovery and relief; with cases where there is a full and general answer and hearing, upon the whole merits. This is not the place to go into a full vindication of this doctrine, though it

appears to me supported by a close comparison of the authorities, keeping in view the distinction alluded to.¹⁶

In my view of the matter, therefore, it is incumbent on the plaintiff to establish affirmatively, that *Wheeler* had notice, before the Court can take from his grantees the legal estate vested in them, even supposing notice to have been brought home to the latter at their respective purchases from him. I do not dwell on this last consideration, though there is much room for observation, because there is not sufficient proof to affect the original purchasers with notice, and therefore it is not necessary to consider, how the case would otherwise stand as to notice to the sub-purchasers under them.

It is also a circumstance not altogether to be passed over, that *Magee* being dead and his estate insolvent, and the defendants having made expensive improvements upon their estates, they can, in case of a decree against themselves, have no remedy over upon their covenants of warranty against *Magee*, or his representatives. If *Mc Neil*, instead of lying by for so great a length of time, had pressed for redress at an early period, they might have had an effectual remedy ever.

I lay no stress upon the releases which the defendants have procured from *Binney*, because they operate as a simple extinguishment of his claim against them under the mortgage to *Carey*, assigned to *Amory*, and by him to *Binney*. They do not purport to assign any title, or to grant an interest in or under that mortgage to either of the releases; and therefore create no bar in the way of the plaintiff.

Upon the whole, the conclusion to which my mind has arrived is, that there would be great difficulties in the way of relief for

¹⁶ See *Williams vs. Williams*, 1 Ch. Cas. 252. *Harris vs. Ingledew*, 3 P. Will. 91, 94.—*Eyre vs. Dolphin*, 2 Ball & Beat, 290, 302, 303.—*Jerrard vs. Saunders*, 2 Vez. jun. 454, 458.—*Beames Pl.* 233, 245.—*Bruce vs. Duchess of Marlborough*, 2 P. Will. 491.—*Jones vs. Thomas*, 3 P. Will. 244, note F.—*Sugden Vendors*, ch. 18, p. 701, 702.—*Hardy vs. Reeves*, 5 Vez. 426.—*Coop. Eq. Pl.* 312.

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the plaintiff, if *Magee* were now before the Court, as sole owner and defendant ; that the equity is far less strong against the purchasers under him ; and that, under all the circumstances, my duty is to dismiss the bill ; but it will be without costs to either party.

Bill dismissed.

UNITED STATES vs. BENJAMIN HAINES AND OTHERS.

The crew of a ship who have signed shipping articles for the voyage under a particular master, without any clause providing for a change of master, are not discharged from the articles by the dismissal of the master by reason of sickness, or any other reasonable cause, and the appointment of a new master ; but they are bound to obey the new master.

If in such case they combine together to refuse all duty on board, and to refuse obedience to the new master, that is an endeavour to make a revolt within the meaning of the crimes act of 1790, ch. 9 [36], § 12.

INDICTMENT against the defendants for an endeavour to make a revolt on board the ship *Plato*, in *Boston* harbour, founded on the crimes act of 1790, ch. 36 [9], § 12. Plea, not guilty.

At the trial it appeared in evidence, that the ship was owned by *American* citizens, and was bound on a voyage from *Boston* to *Havana*, from thence to ports in *Europe*, from thence to the *East Indies*, and back to *Europe* or the *United States* ; and that one *Thomas Dimmock* was master. The defendants were seamen on board, and had shipped for the voyage under the common shipping articles, in which *Thomas Dimmock* was described as master, and there was no clause, "or whoever else shall be master for the voyage," in the articles. The ship being ready for the voyage dropped down to the outer harbour of *Boston*, called *Nantasket Roads*, to proceed to sea, about the 10th of June 1829. But the master, before actually proceeding to sea, was taken ill with a dangerous disease ; and in consequence of

his illness it became necessary to substitute another master for the voyage. The new master (who was a competent and suitable master) came on board with some of the owners, while the ship lay in *Nantasket Roads*, and the necessity of the change of the master was stated to the seamen. They made no particular objection to the new master, whose character did not appear to be known to them; but the defendants and another of the crew (in all seven) contended, that their contract was dissolved by the removal of the master, and they accordingly refused to go on the voyage. Orders were given by the new master to weigh anchor and proceed to sea; which the defendants refused to obey; and those of the crew who were ready to obey, took the starboard side of the ship, and the defendants and those who acted with them took the larboard side. The master and owners then resorted to persuasion, and endeavoured to induce the defendants to return to their duty, and to obey the orders; and each being severally asked, refused, though the legal consequences of their refusal was stated to them. They offered no force to the master or owners, and used no threatening or insulting language. The defendants were then carried on shore, and being apprehended on a warrant, were brought before the District Judge, who upon the examination explained the law to them, and urged their return to duty. But they refused, and were committed for trial. The owners, upon the examination, expressed an entire willingness to take them on board again, and to forgive and forget the past, if they would go upon the voyage; but these offers had no effect.

The cause was argued by *S. D. Parker* for the defendants, and by *Dunlap* (District Attorney) for the *United States*. Two points were made in the defence. 1. That the contract of shipment was dissolved by the appointment of a new master. 2. That the acts of the defendants did not amount to the legal offence charged in the indictment. On the last point, the case of *United States vs. Kelly* (11 *Wheaton*, 417) was cited.

Dunlap, in reply, cited *United States vs. Hamilton*, (1 *Mason R.* 443,) *United States vs. Smith*, (1 *Mason R.* 147,) *United States vs. Hemmer*, (4 *Mason R.* 105,) and he contended, that the case in 11 *Wheaton*, 417, was in no respect variant from the doctrine stated in the latter cases.

STORY J., in summing up to the jury, said :—The principal facts in the case are not disputed ; and the only question of fact suggested for consideration in the defence is, whether the defendants acted and cooperated together in a common purpose, or separately refused duty without any encouragement or mutual understanding. Upon this the jury will pass their judgment, though as the parties were all present and refused duty at the same time, and separated themselves from the rest of the crew, there would not seem much room to doubt as to their conduct being governed by a common combination and encouragement. A mere refusal to do duty on the part of a single seaman, without any attempt to encourage, or aid, or influence any others of the crew to the same act, would certainly not amount to an endeavour to commit a revolt. There must be some effort or act, to incite or encourage others to disobedience, or some common combination, or understanding, to act together for mutual encouragement or support in such disobedience.

There are two questions of law arising upon the facts. The first is, whether in the case of a dismissal of a master for a reasonable cause without fraud, the contract with the seamen is dissolved, unless the shipping articles contain some clause providing for the substitution of a new master, so that the seamen are not bound to perform the voyage, or to obey the new master. The second is, whether, supposing there was a mutual cooperation and combination of the defendants to refuse duty, and to disobey the new master, that amounts to an endeavour to make a revolt.

We do not think there is any real difficulty in either point. As to the first, the contract created by the shipping articles is not, by

the maritime law, a contract exclusively between the existing master and the seamen for the voyage. It is rather a contract between the seamen and the owner through the instrumentality of the master, as agent of the owner, than on his own account. For the performance of the contract, however, the seamen have the security of the master and the owner, and also of the ship itself, by a lien thereon for their wages. There is an implied right of the owners to substitute any other master during the voyage, and an implied obligation on the part of the seamen to obey the master for the time being. If, indeed, they do not expressly assent to the substitution, as between themselves and the original master, he may not be absolved from his responsibility for the wages antecedently due. But this does not affect the right of the owner to appoint another master. It would be most injurious to the interests of commerce and navigation, if any other rule prevailed. If the shipping contract were dissolved by the mere change of master, in whatever stage of the voyage it might occur, the whole objects of the voyage might be defeated by the delays incident to the shipment of a new crew, and the exposure of the property to extraordinary risks. The master might die, might be disabled, or might misconduct himself in the course of the voyage, so that there might arise a necessity of appointing a new master. It might occur at sea, or in a foreign port. And if by such an event, the shipping contract was dissolved, there would be an end of all obedience, and of all right to wages, for any subsequent services. The ship might, if the master should die on the sea, be exposed to the most imminent perils. She might even be lawfully deserted, and left to the unbroken power of the winds and waves. There would be an end of all command and all obedience on board. Such a state of things never could have been contemplated by the maritime law; and the very circumstance that the mate in such a case has been adjudged to succeed rightfully to the ordinary command as master, is decisive against its legal existence. In truth, if the law were so, it would

be not less disastrous to the seamen themselves. They might be dismissed in a foreign port, at a distance from their homes, in a desert island, or in short at any other place, where the occurrence might take place ; and left to work their way to their own country in the midst of every sort of hardship and peril. It is, therefore, not desirable, in any view of the matter, for any party, that such a principle should be recognized as law. We have no difficulty in declaring, that the shipping articles were not dissolved by the change of the master ; and that the maritime law still held it obligatory upon all the parties. The new master, succeeding to the old by the authority of the owner, became the lawful master for the voyage ; and the seamen were bound to obey him, as such, during the voyage. This, indeed, has been repeatedly adjudged in this Court in the cases cited at the bar, and others ; and we see no reason to change our opinion.

As to the second point,—assuming that there was a mutual co-operation and combination of the defendants not to do duty, but to disobey the master, the question is, whether it amounts to an endeavour to commit a revolt in the sense of the statute. We are clearly of opinion, that it does. What is a revolt ? It is an open rebellion or mutiny of the crew against the authority of the master, in the command, navigation, or control of the ship. If the crew in a mutiny were to displace him from the actual command of the ship, and appoint another in his stead, that would clearly be a revolt. It would be an actual usurpation of his authority on board of the ship, and an ouster of him from the possession and control of it. But there may be a revolt independent of the appointment of another to the command. If the crew should compel the master against his will, by threats or otherwise, to navigate the ship, or manage her concerns, according to their own directions, and prevent him from the free exercise of his own judgment, that would be an effectual usurpation of the command of the ship, and in the sense of the law, a revolt. In

short, whenever, by the overt acts of the crew, the authority of the master in the free navigation or management of the ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is, intentionally caused by such acts, a suspension, actual or constructive, of his power of command, it is a revolt of the crew. Direct, positive force upon the master is not essential; positive constraint or imprisonment of the master is not essential. A total refusal to perform any duty on board, until he has yielded to some illegal demand of the crew, when it has produced *de facto* a compliance, or a suspension of his power of command, is a revolt. And any act, or attempt, or combination to produce such a revolt, is an endeavour to make a revolt. These cases are not put as the only ones, in which a revolt may exist. They are put merely as examples and illustrations of the doctrine. If an army by a general combination refuse obedience to all orders of their commander, it is just as much a revolt, as if they had by the same combination compelled him to obey the orders of an usurper. The offence is in each case the same in its essence, though it may differ in the degree of aggravation. In each case there is a total suspension of his power of command by the illegal acts. The doctrine, which is here stated, has been often held in this Court, and particularly in the cases of *United States vs. Smith*, (1 *Mason R.* 147,) and *United States vs. Hemmer*, (4 *Mason R.* 105.) We see no reason to doubt it, or to depart from it.

But it is supposed, that the case of *United States vs. Kelly*, (11 *Wheaton R.* 417,) inculcates a different doctrine. If it does, we are certainly bound by it. But I feel the utmost moral certainty, that such was not the understanding of the Court itself; and though there is some slight foundation in the language used in that opinion for the present argument, a close examination of it will not justify the conclusion, that it is at variance with what we have now asserted as our own opinion. That case was brought before the Court for the mere purpose of ascertaining, whether,

as the act of Congress does not define the offence of endeavouring to make a revolt, it was competent for a court of law to give a judicial definition of the offence. There had been a doubt expressed elsewhere, whether it was not indispensable, that Congress should have defined what a *revolt* was, before the Court could proceed to punish it; and that doubt had been followed up by a decision, that such a definition by Congress was indispensable, and that decision had led to an acquittal of the person charged with the offence. So that the act of Congress, so far as it touched this offence, was reduced to a nullity. My learned brother, Mr. Justice *Washington*, and the District Judge of *Pennsylvania*. thought it their duty, under such circumstances, to bring the point, when it arose before them, to the Supreme Court for a final decision. And the Supreme Court overruled the decision above alluded to, and held it competent for the Court to give a definition of the offence, and punish it under the act of Congress. Mr. Justice *Washington*, in delivering the opinion to the Court on that occasion, said, that "the offence consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command." But this language does not import, that the removal from the command must be by physical force. The Court look to the fact, whether there is an overthrow of the master's authority, or a removal of him from his command, intended; and not to the mode by which it is accomplished. The overthrow of authority may be just as complete, the removal from command may be just as effectual, by a universal disobedience to all orders, producing an actual suspension of the master's authority or command, as by actual force, or personal imprisonment, or driving the master on shore. The subsequent language of the Court demonstrates, that it had in its view, in this part of the opinion, not only cases of forcible, but of constructive, removal from command; for the Court go on to say, "or against his will to take possession of the vessel by as-

suming the government and navigation of her, *or* by transferring their obedience from one lawful commander to some other person." Now these passages show, that the Court, by using the disjunctive "*or*," had in contemplation some classes of cases, not minutely specified in the preceding clause. If no other acts but such as the disjunctive clauses embraced were endeavours to make a revolt, in the sense of the act, the preceding clause was wholly unnecessary. But it was perfectly proper, if the latter clauses were only illustrations of a few cases comprehended under the more general description in the first clause. At all events, no person can say, that the definition contained in the first clause is to be rejected; and in the view we take of its true exposition, there is nothing in it, that trenches upon the opinions held by this Court. In truth, I consider the definition given by the Supreme Court not to have been designed to have more than an affirmative operation; that is, to declare that such acts would amount to the offence, and not negatively, that none others would.

I was one of the judges who concurred in the opinion given in the Supreme Court; and it was matter of utter surprise to me, when I first learned that such a narrow interpretation of it, as is now contended for, had been contended for at the bar. I have reason to know, that it was equally a surprise upon others of my brethren who concurred in that opinion.

Upon the whole, thinking as we do, that there is no real repugnancy between the opinion of the Supreme Court and our own, we adhere to the latter, and give it as law to the jury.

Verdict guilty, and sentence accordingly.

UNITED STATES vs. SAMUEL LANGTON AND TRUSTEES.

Under the trustee process of *Massachusetts* by statute of 1794, ch. 65, if the trustee swears he has no goods, effects, or credits of the debtor in his hands, he is entitled to be discharged, unless, from other parts of his disclosure, that averment is overthrown.

Where an assignment does not, on its face, purport to be of all the debtor's property, it is incumbent on the *United States*, if they insist on a priority of payment under the act of Congress of 1799, ch. 128, § 65, to establish that it does, in fact, contain all the debtor's property.

A small portion left out by mistake or fraud, will not defeat the priority of the *United States*.

An assignment of *all* the debtor's property in a schedule referred to, which enumerates only specific property, and does not purport to be all, affords no presumption that it is all the debtor's property, or a general assignment.

One of the trusts of an assignment was to pay "8400 dollars on custom-house bonds, on which *M* is surety," *M* being one of the assignees; he was surety on bonds to a less amount; but the debtor in fact owed bonds to the custom-house, to the amount of 8257 dollars; it was *held*, that no bonds were included in the trust but those on which *M* was surety.

The trustee process lies against assignees in favour of the *United States*, where a debtor makes an assignment of his property in trust to pay custom-house bonds, or other debts due to the *United States*, to attach the funds to the amount of such trust, in the hands of the assignees, notwithstanding at law, the assignment passed the property clothed with the trust, to the assignees.

Quære, whether parol evidence is admissible to explain the intent of the parties in the above assignment, so as to show whether *all* bonds were intended to be included, or those only, on which *M* was surety.

SUIT upon the trustee process of *Massachusetts* by statute of 1794, ch. 65. The only questions in the cause arose upon the answers of the trustees; and were argued by *Dunlap* (District Attorney) for the *United States*, and by *Fletcher* and *Rand* for the trustees.

STORY J. This case comes before the Court under the trustee process of *Massachusetts*, (act of 1794, ch. 65,) the main object being to charge the trustees as garnishees of the principal debtor, by attaching his funds in their hands.

The case turns wholly upon the answers of the trustees. They have come into Court and have declared, that they had

not in their hands or possession at the time the writ was served on them, any goods, effects, or credits of the principal, and they have submitted themselves to an examination on oath touching the premises. They are therefore entitled by the very terms of the statute to a discharge with costs, "if, upon such an examination, the said declaration shall appear to the Court to be true." I cannot agree to the suggestion at the bar in the broad and unqualified manner in which it is made, that persons, sued as trustees, are in all cases to be charged by the Court, unless they clearly discharge themselves. Where they expressly swear that they have no goods, effects, or credits in their hands or possession of the debtor, that declaration must be taken for true, unless the Court can clearly see, from the subsequent examination, that it is untrue. Where they neither expressly admit nor deny their liability, but put all the facts before the Court, and leave the latter to decide the matter of law arising thereon, there must be sufficient upon the face of those facts to justify the Court itself in pronouncing a judgment, which shall charge them as trustees. If those facts, fully and sincerely disclosed, leave the matter in doubt, for myself I cannot perceive how a judgment, charging them, can be pronounced, upon any acknowledged principles of law. I agree, that doubtful expressions may be construed most strongly against the trustees, if they admit of two interpretations; but they are not to be tortured into an adverse meaning or admission. The answers are not to be more rigidly, or differently construed, from what they would be in a bill in chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer, what in conscience they do not positively know. The law would otherwise be a snare, which might entrap them to their ruin, and involve them in a double responsibility and payment. And such, I conceive, is the real doctrine in the State Court,

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notwithstanding some general expressions, which have been quoted, and are applicable to special cases.¹

By the answers of the trustees it appears, that *Langton* (the principal debtor) being in failing circumstances, on the 5th of January 1828, executed an assignment, by indenture, tripartite, of certain property to the trustees, upon certain trusts stated in the deed of assignment. It begins by reciting, that *Langton* is indebted in large sums of money to the parties of the second part (the trustees), and third part (general creditors), and that *W. Monroe* (one of the trustees) is liable, as indorser and surety of *Langton*, to pay large sums of money, and also has lent and accommodated him with money, a schedule of which sums, debts, and liabilities, is annexed, marked *A*. It then farther recites, that *Langton* is possessed of certain goods, wares, merchandises, choses in action, credits, and demands, and other property, schedules whereof are annexed, marked *C. D*. It then recites the desire of *Langton* to secure to *Monroe* a full indemnity for all his liabilities as indorser and surety, and payment also of monies loaned, and an equal distribution of the property which shall remain among the other parties of the second and third parts, so far as it will extend, and they are ready to accept and release *Langton*, as far as the same will go. Afterward there follows an assignment to the trustees of all the goods and other property, in the schedules *C* and *D*, with a moiety of the brig *Dido*, a policy on her cargo, and the household furniture of *Langton*, at No. 1, *Temple Street*. The trusts are declared to be, to collect the debts, &c. and sell the property, &c. and to apply the proceeds as follows:—"In the first place, to apply the said trust monies to the payment and discharge of \$8400, due for custom-house bonds and liabilities, as mentioned in said schedule *A*; and also to the payment and discharge of the three

¹ *Leber vs. Armstrong*, 4 Mass. R. 206.—*Cleveland vs. Clap*, 5 Mass. R. 201.—*Whitman vs. Hunt*, 4 Mass. R. 272.—*Hatch vs. Smith*, 5 Mass. R. 42, 49.—*Gordon vs. Webb*, 13 Mass. R. 215.

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sums of money mentioned in the said schedule *A* as being lent and accommodated to said *Langton*, amounting in the whole to the sum of \$9784.69, monies so lent, &c. as stated in said schedule *A*, and which said three sums of money, *together with the said amount of custom-house bonds, amounts in all, as near as can be ascertained*, to the full sum of \$18,184.69, which amount is to be paid and satisfied in full." This is the material clause on which one of the questions made at the bar turns; the other clauses require no particular consideration. The schedule *A* begins as follows:—"Schedule of claims and demands due to *Washington Monroe* from *Samuel Langton*, custom-house bonds and notes by him indorsed for said *Langton*, as monies borrowed to be paid in full.

"Amount of custom-house bonds upon which *Washington Monroe* is surety, \$8400.

"Notes payable to *Washington Monroe* and by him indorsed for said *Langton* as follows." Then follows a special enumeration of them; and then a memorandum of monies borrowed, and other notes, &c. in the whole amounting with the custom-house bonds to \$32,084.96. Schedule *B* contains the debts due to other creditors.

The custom-house bonds owing by *Langton* amounted in fact to the sum of \$8257.43; and *Monroe* was surety upon all of them, excepting one for \$1752, which is now in suit. None of them were due at the time of the assignment; but all those upon which *Langton* is surety, amounting to \$6505.43, have since been paid. The whole amount of the property assigned to the trustees by the assignment, has produced less by \$10,000, than the debts and liabilities of *Monroe* provided for in the assignment.

The trustees, upon their disclosures, are certainly entitled to be discharged from the suit, unless some one of the grounds contended for in argument, on behalf of the *United States*, can be maintained in point of fact and law. They explicitly deny, that

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they have any goods, effects, or credits of *Langton* in their hands or possession; and as no evidence *aliunde* is admissible by law, to control or contradict their answers, the *onus probandi* is on the *United States*, to extract an opposite conclusion from the facts stated in them.

Two grounds are contended for by the *United States*. In the first place, that the assignment is an assignment of all the property of *Langton*; and if so, the priority provided for by the act of 1799, ch. 128, § 65, attaches in favour of the *United States*. I agree at once to the reasoning at the bar, that if the assignment be in fact of all the debtor's property, although it does not so appear upon the face of the instrument, the priority of the *United States* attaches. The same rule applies if a small part be left out for the purpose of fraudulent evasion of that priority. This doctrine is fully supported by the cases of *United States vs. Clarke*, (1 *Paine Cir. R.* 639;) *United States vs. Hooe*, (3 *Cranch*, 73, 91;) *United States vs. Howland*, (4 *Wheaton R.* 108, 115;) and *Conard vs. Atlantic Insurance Company*, (1 *Pet. Sup. Ct. R.* 439.) But the difficulty is, that the present assignment purports on its face to be an assignment, not of all the debtor's property, but of all the goods, &c. in the schedules *C* and *D*; and these schedules do not purport to be all the property of the assignor, but of certain specific effects. In such a case (as was justly said by the Court, in 4 *Wheaton*, 108, 116), the presumption must be, that there is property not contained in the deed, unless the contrary appears. The *onus probandi* is thrown on the *United States*. Now there is not only no proof in the case, that this assignment does contain all *Langton's* property; but both the trustees swear, that they believe it does not contain all his property; and there is not a shadow of evidence, that there was a suppression of any of his property, with a fraudulent design to evade the rights of the *United States*. On the contrary, it does appear that the parties at the time had no distinct knowledge of the actual sums owing on bonds at the custom-house. We may,

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therefore, upon the mere footing of authority dismiss this ground of argument as untenable.

But in the second place it is contended, that if this be not a general assignment, there is an express provision giving priority of payment out of the funds, to the custom-house bonds, of which the *United States* are entitled to avail themselves in the present form of suit.

One answer urged on behalf of the defendants to this ground is, that the trustee process furnishes no means to enforce such a right, even if it exists. The argument is this. The trustee process can only reach goods, effects, or credits of the debtor himself. If the assignment is good and valid in point of law, it passes the goods &c. to the trustees, as their property, to be by them applied to the trusts stated in the assignment. The whole reasoning, on behalf of the *United States*, assumed, that the assignment is good and valid; and if so, the trust fund, to the amount of the custom-house bond provided for by it, is a trust fund belonging to the *United States*, and not to the debtor; and the *United States* cannot attach their own property by this process in the hands of the trustees. And reliance is placed on the case of *Conard vs. The Atlantic Insurance Company*, (1 *Peters's Sup. Ct. Rep.* 386, 438, 439,) where it was held by the Supreme Court, that even a general assignment passes the property to the assignees, and gives a priority of payment only out of the fund, and does not, *pro tanto*, defeat the assignment. To every thing stated in that opinion, I give my cordial assent, knowing that it was prepared upon very full deliberation of the Court. I agree that the present assignment is good and valid, in point of law, to pass the property to the assignees. But the conclusion contended for by the defendants' counsel does not follow upon such an admission. If the *United States* had been called upon to assent, and had in fact assented, to the trusts created by the assignment so as to create a privity between themselves and the assignees, there might be great force in the argument. But until

such assent, actual or constructive, the property was, by operation of law, a resulting trust for the assignor. If *A* transfers his goods or money to *B*, to be delivered over or paid to *C*, unless *C* assents, expressly or impliedly, to the bailment or trust, the trust is a resulting trust for *A*. If *C* refuses to receive the goods or money, *A* may recover them back for his own use. In such cases, the law implies a resulting use or trust for the benefit of the grantor, where the object of the trust has wholly failed. This is, as I think, the natural result of the general principles of law upon this subject. Our State decisions, in relation to the trustee process, uniformly assume the doctrine to be sound, and make no distinction, whether the goods, credits, or effects in the hands of the trustee are equitable or legal; whether they are a naked debt or bailment, or a resulting trust, where the assignment, *pro tanto*, has become inoperative, being good and valid in its general structure. In every case where a general assignment is made for the benefit of creditors, and an attachment under this process intervenes, before all the creditors have become parties, the assignment is not held utterly void, but is held inoperative only as to the proceeds not covered by the debts of the antecedent creditors; and if any thing remains after such attachment, that may go, under the assignment, to any creditors who subsequently become parties. In short, the trust created by the assignment is defeated only *pro tanto*. And a creditor, who refuses to come in under the trust, may sue in the same manner as if he were not named or included in it. It appears to me, that wherever the property of a debtor is in the hands of an assignee under trusts, which are exhausted, or have failed, so that the assignee holds the property for his benefit by operation of law, the trustee process is a proper process to reach it. The statute of 1794, ch. 65, seems to me to have had such cases peculiarly in its eye in creating the remedy. The words of the preamble clearly cover them. They are "goods, effects, and credits," of the debtor "so intrusted and deposited in the hands of others, that the same cannot be attached by the ordinary process of law."

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Another answer suggested at the bar is, that the *United States* are not, upon the face of this assignment, *cestuis que trust* ; but that the trust is created in favour of *Monroe* to discharge the custom-house bonds, and thus to exonerate him from his suretyship. But, assuming this construction of the instrument to be correct, (on which I give no opinion,) it would not aid the case of the defendants. If the debtor has confided his property to them to fulfil certain trusts, the assignees are bound to fulfil those trusts, and cannot apply it to other purposes. If they should refuse so to do, and the *cestui que trust* cannot enforce it, or the trustee has failed ; they must be charged as trustees of the debtor, because it remains, in equity, his property, by way of resulting trust or indebtment. If they should not refuse, then the property is a fund in their hands applicable to the trust, and they are merely his agents to pass it over to the creditors. Now in this very process the *United States*, supposing *all* custom-house bonds are included in the trust, seek to have the acknowledged trust property of the debtor applied to the very purpose he intended ; and I can perceive no solid objection upon reason or authority, or even technical grounds to refuse it. It is the debtor's property "intrusted" to them for this purpose, and not attachable by the ordinary process of law. In *Jarvis vs. Rogers*, (15 *Mass. R.* 389, 414,) Mr. Chief Justice *Parker*, in delivering the opinion of the Court, said :—" I have neither heard nor seen any judicial decision, tending to prove, that if a creditor accidentally gets possession of his debtor's goods, or if a debtor commits them to him on a particular trust or confidence, the creditor has a right to retain them as security for his debt. On the contrary, any other creditor may attach them, if they can be seized by an officer ; or the creditor may be charged as trustee, if they cannot be come at to be attached."

The strongest objection to a recovery by the *United States* yet remains for consideration. It is, that the assignment did not mean to provide for the payment of all custom-house bonds owing

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by *Langton* ; but only for those, on which *Monroe* was surety ; and all these have been paid without scruple. It has been said, that *Langton* might well be presumed to intend to cover *all* bonds, because it would save him from imprisonment on execution at the suit of the *United States*, from which he would not be entitled to be discharged, as in cases of private debts upon taking the poor debtor's oath ; but only by the special authority of the secretary of the treasury under the act of 1798, ch. 66. I do not know that a court is at liberty to indulge any such presumption, unless the words of the instrument itself justify it upon a plain construction of their import.

Let us attend then to the words of the present assignment. The direction is "to apply the trust monies to the payment and discharge of \$8400 due for custom-house bonds and liabilities, as mentioned in said schedule A." By turning to that schedule we find the description to be, "amount of custom-house bonds, upon which *Washington Monroe* is surety, \$8400." So that the schedule does not include *all* custom-house bonds ; but those only, upon which *Monroe* is surety. If, therefore, we take the general clause as it is controlled and explained by the schedule, (as we are bound to do,) it is manifest that the custom-house bonds, alluded to, are those only, on which *Monroe* is surety. The preamble to the assignment fortifies this conclusion ; for it recites as a main object the desire to secure *Monroe* for his liabilities as indorser and surety ; and the whole structure of the assignment shows, that he was a favored creditor, not merely as surety, but as indorser. He is not yet indemnified to the amount of \$10,000.

But it is argued, that the sum provided for, viz. \$8400, is more than the amount due on the bonds on which *Monroe* is surety, and that the actual amount of all the custom-house bonds approaches nearer the sum, viz. to \$8257 ; and therefore the presumption is, that *all* bonds were intended to be included. Now, in answer to this, there is force in the remark made at the

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bar, that the sum seems put down as a mere estimate, and not as the exact amount; for the terms of the assignment are, that "the three sums of money, together with the said amount of custom-house bonds, amount in all, *as near as can be ascertained*, to the full sum of," &c. Besides, in either view, there is a mistake as to the amount of the custom-house bonds. If the amount of all the bonds had been exactly \$8400, there might have been a stronger ground for argument. If, then, the sum be mistaken, and we resort to the other words of the instrument to qualify or explain the intention, we there find the bonds described to be those, on which *Monroe* is surety. The mistake is, therefore, corrected by the context. Where there is any repugnancy or mistake in a description, if sufficient certainty as to the thing intended on the whole appears, the repugnancy or mistake does not vitiate. Taking the whole description together, it will run thus:—" \$8400 for custom-house bonds, upon which *W. Monroe* is surety;" and upon such an assignment, intended for his special protection, there cannot, I think, be a legal doubt, that the mistake of the amount must yield to the certainty of the other part of the description. The whole provision must otherwise be rejected for utter uncertainty, and *Monroe* be left without any security, since the misdescription as to the amount of *all* the bonds owing to the *United States* is equally clear; or we must resort to parol evidence to explain the latent ambiguity.²

My opinion is, that there is no necessity to resort to such evidence in this case. But if resort is to be had, the answers of the trustees, and particularly of *Monroe*, are entirely decisive. He explicitly swears, that no other bonds, than those on which he was surety, were in the contemplation of the parties, or intended to be provided for; and that at the time of the assignment, the exact amount of these was not known to them.

² See *Colpoys vs. Colpoys*, 3 Jac. & Walk. R. 451, 462.

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This is not all. The *onus probandi* is on the *United States* in this case, to establish, that the bond now in controversy is covered by the assignment; for otherwise, *Monroe* has a right to retain for the deficiency due to him. There is an acknowledged mistake in the *amount* of the bonds in the description. The *United States* must show, either that there is sufficient certainty on the face of the instrument to establish their claim, (which has not been done,) or that parol evidence is admissible to explain the intent; and then that very evidence overthrows their claim.

Upon the whole, my opinion is, that the trustees are entitled to be discharged, and judgment must be entered accordingly.

Trustees discharged.

 UNITED STATES vs. THOMAS GRUSH.

The words "high seas" in the crimes statute of 1825, ch. 276, § 22, mean the unclosed waters of the ocean on the sea-coast outside of the *fauces terra*.

The State Courts have jurisdiction of offences committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of a county; and in such cases the Circuit Courts of the *United States* have no jurisdiction under the said statute.

Where an arm of the sea or creek, haven, basin, or bay is so narrow that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county.

In such waters it seems, that the admiralty and common law courts have concurrent jurisdiction.

The county of Suffolk, in which the city of *Boston* is included, extends to all waters between the circumjacent islands, down to the *Great Brewster*, and *Point Alerton*.

INDICTMENT against the prisoner for an assault on one *Neil Lemon* with a dangerous weapon, and with an intent to kill, founded on the act of Congress of 1825, ch. 276, § 22. The indictment contained several counts, in some of which the offence

was alleged to be committed on the *high seas*, and in others in *Massachusetts Bay*. The prisoner pleaded not guilty, and was convicted of the offence by the jury.

A motion for a new trial, on the ground of the want of jurisdiction of the Court, was made, and also a motion in arrest of judgment, on the ground, that in the caption of the indictment, there were not after the words in the margin, "District of *Massachusetts*," the letters SS. These motions were argued by the prisoner's counsel and the District Attorney.

For the prisoner it was contended, by Mr. Parker, that the *locus in quo* was neither on the high seas, nor in *Massachusetts Bay*, nor out of the jurisdiction of the Commonwealth of *Massachusetts*, but in the harbour and port of *Boston*, in the county of *Suffolk*.

That the *Massachusetts* statute of 1790, vol. 1, ch. 4, p. 383, spoke of the *Light-House* or *Light-House Island* in the harbour of *Boston*. This was the outer light-house. The *Massachusetts* statute of 1819, vol. 2, ch. 69, p. 517, spoke of *Hallway Rock* in *Boston Bay* and *Long Island Head* in *Boston* harbour. That in the *Laws of the United States*, 2d vol., *Story's* edition, p. 1175, statute of 1810, ch. 64, in the 2d and 5th sections, the *Greater Brewster* was declared to be at the entrance of the harbour of *Boston*. That the force of these expressions would be apparent, by an inspection of the charts in the case. In considering *Bevans's* case, the place where the ship was anchored was such, that no person, standing on the main land in any direction, could testify to any events on the opposite main land, supposing the island removed. He could not find that *George's Island* had been ceded to the *United States*, although the *United States* government were erecting a sea-wall there at great expense.

Upon the other question, (the omission of the SS.,) for his part he was quite willing that all the unmeaning forms of indictment should be suppressed; and this case might afford a convenient opportunity to set a useful example. He was willing

that the exception should not prevail, if the indictment could be supported without it. But it was his duty to his client to place it before the Court for consideration. If practice be indicative of the law, it might be confidently asserted, that the SS, had been uniformly retained in the *Massachusetts* State Courts, and had never before been omitted in the *United States* Courts in this district. It was used in the *New York* State Courts. See *Davis's Justice*, p. 234 to 237 ; "*Dutchess County, ss.*" same book 221 and the following pages, and 240, 241. It was used by magistrates in acknowledging deeds, in taking depositions, and in the caption of all warrants. It was prescribed as a necessary part of the form in the *Mass. stat.* of 1784, ch. 8 ; also the civil writs of the *United States* uniformly retained it. In *England*, it seemed sometimes to be used, sometimes omitted. In *Tremain's Pleas of the Crown*, there was no omission of it. In 4 *Chitty's Crim. Laws*, p. 17, "County of ———, to wit," was used. See pp. 36, 58, 59, 60, 61. In page 249, "*West riding of Yorkshire, to wit ;*" 248, "*Cambridgeshire, to wit ;*" 343, "*England, to wit.*" In *Russell and Ryan's Cr. Cases*, reserved for the opinion of the twelve judges, p. 179. *Rex vs. Susanna Goff*, the report stated that the indictment had the *common* caption, "County of *Hants*, to wit." That the practice in this country seemed to be universal, to retain it ; it was sometimes omitted in *England*. That one would draw an inference from *Hobart's Reports*, pp. 171, 172, that like Lord *Coke's* &c., there was much matter of excellent learning in a "*viz.*" He also referred to *Dane's Abridgment*, vol. 7, ch. 218, art. 5, and the various cases there cited.

On the part of the *United States* it was contended, by Mr. *Dunlap*, that in relation to the question respecting the jurisdiction of the Courts of the *United States*, raised in this prosecution (which was instituted before he came into the office of Attorney of the *United States*), it certainly was one of great importance, affecting the sovereignty of one of the States of the Union. He

referred the Court to the following authorities. 1 *Hale*, 424; 2 *Hale*, 15—54; *East's Pleas of the Crown*, 804; 1 *Leach's Rep.* 388; 2 *Leach's Rep.* 1093; 1 *Mason's Rep.* 247; 5 *Wheat. Rep.* 76—93—200; 5 *Rep.* 106, *Sir Henry Constable's case*. In relation to the statutes of the state of *Massachusetts* and of the *United States*, referred to on the other side, he said that it was evident that they were intended to indicate geographical, and not legal boundaries. They never were intended to fix the boundaries of the jurisdiction of the *United States* and the State Courts. The admiralty jurisdiction of the Courts of the *United States* was to be ascertained by legal principles and decisions establishing what were the high seas. He stated a case much stronger than the present, where the state tribunals had declined jurisdiction, a case in which he was the counsel for the defendant. According to the best of his recollection, these were the facts: A man of the name of *Butler* stole a watch on board the steam-boat from *Nahant*, when she was inside of *Pudding Point Gut*, and below *Apple Island*, clearly within *Boston* harbour. The case was submitted to Judge *Dawes*, the judge of the Municipal Court (than whom no man was better acquainted with the ancient and acknowledged limits of the jurisdiction of the Criminal Courts of the county of *Suffolk*), and the grand jury. No bill was found, and it was for the supposed want of jurisdiction, for the thief was caught in the fact, taken in the *mainour*. If the *United States* tribunals had not jurisdiction, where the *faucēs terræ* were five or six miles apart, and where witnesses on either side could not reasonably discern what was going on upon the other side, most offences committed on board of vessels in that vicinity must go unpunished; for it would be, in many cases, where a vessel was in motion at the time, impossible to ascertain whether she was within the boundaries of *Essex*, *Norfolk*, *Plymouth*, or *Suffolk*. Even in the case of *Suffolk* and *Middlesex*, separated only by *Charles* river, whose course, banks, and channel were known, it had been found necessary to provide by the *Massachusetts* statute

of 1794, ch. 31, § 1, that the criminal jurisdiction of the two counties should be in *common over the waters* of that river.

As to the other point, Mr. *Dunlap* said he had drawn the indictment, and was responsible for all its errors, if there were any. The indictment is headed thus :

“ United States of America,
District of Massachusetts. } ”

“ At a Circuit Court,” &c. &c.

It was contended by the counsel for the prisoner, that there should have been after the word “ *Massachusetts* ” the letters SS. Mr. *Dunlap* contended, that they were *unnecessary* in *all* cases, and would have been decidedly *improper* in *this* case. How these letters SS. had been preserved since the reign of *George the Second*, in this country, was surprising. In that reign both *abbreviations* and *Latin* were prohibited in indictments, which were required to be in *English*. *Chitty's Criminal Law*, vol. 1, pp. 175, 176. That the SS., the want of which was complained of, formed an abbreviation of two *Latin* words, and that this abbreviation was no longer to be found in the *English* indictments of the present day, though not uncommon in indictments in this country, especially in inferior tribunals, where the errors and the jargon of former times were implicitly copied and preserved. That the SS. of the ancient indictments in *England*, and the “ *to wit* ” of many of the modern, were, it was believed, in *all* cases unnecessary. *Chitty* says (in his work, vol. 1, p. 194), the county is stated in the margin thus : “ *Middlesex*,” or “ *Middlesex, to wit*.” In the form given by Lord *Hale* (2 *Hale*, 166, cited by *Chitty*, vol. 1, p. 277), the SS. or *to wit* were omitted, and the county was stated in the margin simply thus : “ *Norfolk*.” That in that standard book of precedents, the *Crown Circuit Companion*, a few of the precedents had the “ *to wit*,” but the greater portion did not have them, but had the name of the county, city, or district, without any prefix or addition. That the very first four forms given by *Chitty*, of commencements of indictments, did not contain the

words *to wit*. *Chitty, C. L.*, vol. 2, ch. 1, and the sixth chapter of the same volume, heads all indictments for treason upon the Stat. Ed. 3d, thus: "*Middlesex*."

That in this case the SS. was not only *unnecessary*, but its insertion would have been decidedly *improper*. Perhaps it would not have *vitiating* the indictment, but it would have been *slovenly* pleading. The heading of the indictment did not say simply "*Massachusetts*," in which case the SS. might serve to signify and supply the omission of the words *District of*, but the venue was put down, as every thing against a prisoner should be, so that he could understand it, in plain *English*, at full length—" *District of Massachusetts*." There was nothing then for the SS. or *to wit* to operate upon or supply, and it would have been an unmeaning, slovenly expletive. It was believed, that no established *precedent* could be produced from any *book of authority*, either in the darkness of past ages or the light of the present, where the venue in the margin of the indictment had the SS. or *to wit* added, when the whole venue was written out, "*County of Suffolk*," "*County of Middlesex*," "*City, Borough, and Town of Westminster*, in the County of *Middlesex*, and the like.

That the flourish at the head of the indictment,

United States of America,
District of Massachusetts, }

was, in fact, no part of the indictment, and would be of no consequence, provided the subsequent language, commencing "At a Circuit Court of the *United States* for the first circuit, holden at *Boston*, within and for the *District of Massachusetts*," &c. &c. should be so explicit as to require no reference to the venue named in the margin. *Chitty*, vol. 1, c. 4, ch. 7.

That in relation to the allowance of nice, literal, mere formal exceptions, the observations of Lord *Hale*, Lord *Mansfield*, Lord *Kenyon*, Lord *Ellenborough*, and this Court, were referred to. *Chitty*, vol. 1, c. 4. p. 170; 2 *Hale*, 193; 1 *East*, 314; 5 *East*, 160; 2 *Maule & Selw.* 386; 1 *Leach*, 383; 2 *Mason R.* 145.

That the allowance of exceptions of this nature carry us back into the dark ages, when lawcraft, like priestcraft, pressed like an *incubus* upon the common sense of the people, and when the common rules of life, to direct the conduct of men in their various relations to each other, which should be as plain as "the way to the parish church," were intricate and shadowed with, and darkened by mystery, affectation, and pedantry.

That the cases referred to by the prisoner's counsel in *Davis's Justice*, and the fourth volume of *Chitty's Criminal Law*, were all cases of warrants from justices of the peace and Bow-street Police Court offices, where nicety in pleading was not required, and where absurd excrescences in forms lingered longer than any where else. But in most of these cases, where the SS. was used, the venue was not set out in full. That the only case of an indictment, where the venue had been put down at length, and where the *to wit* had been added, which had been found, was the case in *Russell and Ryan's* cases in *Crown Law*, and then it was not made a point in any way, and probably got in accidentally by slovenly pleading.

STORY J. It is agreed between the parties, that the place where the vessel, (the *Pacific*,) on board of which the offence was committed, lay at anchor at the time of the commission of the offence, was between *Lovel's Island*, *George's Island*, and *Gallop's Island*, which belong to the city of *Boston*, as part of its territorial limits. The tide ebbs and flows between these islands into what is called the inner harbour of *Boston*; and at all times of the tide there is a great depth of water there, the bottom or channel never being dry; and vessels at anchor there are constantly afloat in the stream. The distances between these islands is about one eighth of a mile. *Hale's* map of *Boston*, and *Wadsworth's* chart of the harbour of *Boston* and the adjacent coasts and headlands are admitted in evidence, as accurate delineations of the same. The nearest headlands on the main

land on each side are the town of *Hull* on the southern, and *Point Shirley* on the northern side of the harbour of *Boston*, and the distance between these headlands is about five or six miles. There are a number of islands between these headlands, with narrow inlets and passages for vessels between them. The main channel into the inner harbour of *Boston* flows also between them, in no instance exceeding one mile in breadth. *Nantasket Roads*, as it is called, or the outer harbour of *Boston*, where vessels, going from and coming to the port, are accustomed to lie at safe anchorage, is on the side contiguous to *Hull*. There are several islands farther out towards the ocean; and particularly the *Great Brewster*, on which the principal light-house stands. The extreme point of the main land, jutting from the southern coast opposite to this light-house, is called *Point Alderton*, and the distance between them is about one mile and a quarter. Processes from the State Courts of the County of *Suffolk* have been at all times, without objection, served as far down as where the *Pacific* lay; and even down to the light-house on the *Great Brewster*; but not below. Vessels are accustomed to anchor, where the *Pacific* lay. The towns of *Boston* and *Chelsea* constitute the county of *Suffolk*. Such are the material facts.

The statute, on which the present indictment is founded (Stat. of 1825, ch. 276, § 22,) declares, "that if any person or persons upon the *high seas*, or in any *arm of the sea*, or in any *river, haven, creek, basin, or bay* within the admiralty jurisdiction of the *United States*, and *out of the jurisdiction of any particular State*, on board any vessel, &c. &c. shall with a dangerous weapon, or with intent to kill, &c. commit an assault on another such person shall on conviction thereof be punished," &c. &c.

There cannot, I think, be any doubt as to what is the true meaning of the words, "*high seas*," in this statute. Mr. Justice *Blackstone*, in his *Commentaries*, (1 Com. 110,) uses the words "*high sea*" and "*main sea*" (*altum mare*, or *le haut meer*) as synonymous;

and he adds, "that the main sea begins at the low water mark." But though this may be one sense of the terms, to distinguish the divided empire, which the admiralty possesses between high water and low water mark, when it is full sea, from that which the common law possesses, when it is ebb sea ;¹ yet the more common sense is, to express the open, uninclosed ocean, or that portion of the sea, which is without the *fauces terræ* on the sea coast, in contradistinction to that, which is surrounded, or inclosed between narrow headlands or promontories. Thus Lord *Hale* says, (*De Jure Maris. Harg. Tracts*, ch. 4, p. 10,) "the sea is either that, which lies within the body of the county, or without. That arm or branch of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner ;" and for this he cites *Fitz Abridg. Corone*. 399, 8 *Edw.* 2. And then he adds, "The part of the sea, which lies not within the body of a county, is called the *main* sea, or ocean."² In *United States vs. Wiltberger*, (5 *Wheat. R.* 76, 94,) Mr. Chief Justice *Marshall*, in delivering the opinion of the Court, manifestly inclined to the same interpretation of the words "high seas," in our penal code. If (says he) "the words be taken according to the common understanding of mankind, if they be taken in their received and popular sense, the "high seas," if not in all instances confined to the ocean, which washes a coast, can never extend to a river about half a mile wide in the interior of a country." The other words descriptive of place in the present statute, give great additional weight to this suggestion ; for if "high seas" meant to include other waters, why should the supplemental words, "arm of the sea, river, creek, bay," &c. have been used ? Lord *Hale*,

¹ See also *Constables's Case*, 5 *Co. R.* 106.

² See *Selden's Fortescue De Laud. Angliæ*. ch. 32, p. 67, &c., notes ; and *Hale de Port.* part 2, ch. 7.—*Harg. Tracts*, p. 88.—*Vattel*, B. 1, ch. 33, § 279 et seq.—*The Twee Gebræders*, 3 *Rob. R.* 336.

following the exact definition given in the book of *Assizes*, (22 *Assiz.* 93,) says, "That is called an arm of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows."³ Both he and Lord *Coke* constantly limit the "high seas" to those waters of the ocean, which are without the boundary of any county at the common law; and we shall presently see, that narrow arms of the sea are deemed to be within the boundary of some county of the realm. But the waters of the ocean upon the open sea-coast are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty up to high water mark, when the tide is full; and are deemed by the crown writers, generally, as the high sea or main sea.⁴

From this view of the subject, I am entirely satisfied, as well upon the language of the authorities, as the descriptive words in the context, that the words "high seas" in this statute are used in contradistinction to arms of the sea, and bays, creeks, &c. within the narrow headlands of the coast, and comprehend only the open ocean, which washes the sea-coast, or is not included within the body of any county in any particular State. And upon the facts admitted in the present case, the place, where the offence was committed, is not the "high seas," in this sense of the terms. It is, in my judgment, "an arm of the sea," in the proper definition of that phrase. But an arm of the sea may include various subordinate descriptions of waters, where the tide ebbs and flows. It may be a river, harbour, creek, basin, or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country. My own opinion is, that arms of the sea, whether of the

³ *Harg. Tracts*, part 1, ch. 4, p. 12; part 2, ch. 7, p. 88.—1 *Hale, P. C.* ch. 32, p. 424.—2 *Hale, P. C.* ch. 3, p. 13, 14, 15, 16, 64.—*Com. Dig. Navigation*, B.

⁴ 2 *Hale, P. C.* 13, 14, 15, 16, 54.—1 *Hale, P. C.* 424.—3 *Inst.* 57, 113.—2 *East, P. C.* 802.—1 *Bac. Abridg. Coroner, B.*—2 *Bac. Abridg. Courts of Admiralty, A.*—*Com. Dig. Admiralty, E.* 7. *Navigation, A.*

one description or the other, are within the admiralty and maritime jurisdiction of the *United States*. But if they are within the body of any county of a particular state, the state has also concurrent jurisdiction therein.⁵ I do not now go over the grounds of this opinion, having upon other occasions gone into them somewhat at large. But to bring a case within the purview of the present statute, it is not sufficient, that the place, where the offence is committed, is within the admiralty jurisdiction of the *United States*, whether it be an arm of the sea, creek, or bay, &c.; but it must, by the very words of the statute, also be a place "out of the jurisdiction of any particular state." And it is out of the jurisdiction of the state, in the sense of this statute, if it be not within the body of some county within the state.

This leads me to consider what is the proper boundary of counties bordering on the sea-coast, according to the established course of the common law; for to that I shall feel myself bound to conform on the present occasion, whatever might have been my doubts, if I were called to decide upon original principles. The general rule, as it is often laid down in the books, is, that such parts of rivers, arms, and creeks of the sea, are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord *Hale* uses more guarded language, and says, in the passage already cited, that the arm or branch of the sea, which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, or at least may be, within the body of a county. *Hawkins* (*Pl. Cr.* b. 2, ch. 9, § 14) has expressed the rule in its true sense, and confines it to such parts of the sea, where a man standing on the one side may see what is done on the other. And this is precisely the doctrine, which is laid down by *Stanton J.* in the passage in *Fitz. Abridg. Corone.* 399; 8 *Edw.* 2; on which Lord *Coke* and the common lawyers have laid so much stress as

⁵ See *Rex vs. Bruce*, 2 *Leach*, C. C. 1093.—*Ryan & Russ.* C. C. 243.

furnishing conclusive authority in their favour.⁶ It is there said, "It is no part of the sea, where one may see what is done on the one part of the water, and the other, as to see from one land to the other." And Mr. *East*, in his *Treatise on Common Law*, (2 *East*, *P. C. ch.* 17, § 10, *p.* 804) manifestly considers this as the better opinion.

In applying the law to the state of facts presented in the present case, I confess, that there does not seem to me any reason to doubt, that the place where the offence was committed was within the county of *Suffolk*. It is not necessary to decide, whether it be a bay, or haven, within the statute, though it might, perhaps, indifferently fall within each denomination, for it is a narrow arm of the sea, and also a place of safe anchorage for vessels.⁷ It appears to me, that where there are islands enclosing a harbour, in the manner in which *Boston* harbour is enclosed, with such narrow straits between them, the whole of the waters must be considered as included within the body of the county. It is certain, that the islands themselves are within the county of *Suffolk*; and whether they are inhabited or not, can make no difference in the principles of law. Islands so situated must be considered as the opposite shores, in the sense of the common law, where persons, standing on one side, may see what is done on the other. There can be no doubt, from the proximity of *Gallop's*, *Lovel's*, and *George's Islands* to each other, that any person, on either of their shores, could see what was done on the other. I do not understand by this expression, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the

⁶ 4 *Inst.* 140, *ch.* 22.—*Staunf. P. C. lib.* 1, *p.* 51, (b.)—2 *Gallis. R.* 409.

⁷ See *Hale De Port. Maris* (*Harg. Tracts*, part 2, *ch.* 2, *p.* 46.) *Com. Dig. Navigation, B. C. D. E.*

naked eye, and clearly distinguished from each other. Indeed, upon the evidence before me, I incline strongly to the opinion, that the limits of the county of *Suffolk*, in this direction, not only include the place in question, but all the waters down to a line running across from the light house on the *Great Brewster* to *Point Alderton*. In the sense of the common law, these seem to me the true *fauces terræ*, where the main ocean terminates.

Upon the whole, my opinion is, that the Court, upon the facts, has no jurisdiction, and that a new trial ought to be granted. This renders it unnecessary to consider, whether the other point, made in arrest of judgment, can be maintained. I allude to the objection, that, in the caption of the indictment, after the usual beginning, "*United States of America, District of Massachusetts,*" the letters (*ss.*) are omitted. The point has, however, been argued ; and, as at present advised, it strikes me to be clearly not maintainable as a valid objection.

The District Judge concurs in this opinion ; and therefore a new trial must be granted. Notice must be given to the proper prosecuting officers of the state, that the prisoner may be dealt with according to law in the State Courts.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1829, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN PITMAN, District Judge.

EDWARD DEXTER

vs.

ANNA ARNOLD, ADMINISTRATRIX OF THOMAS ARNOLD.

In what cases a bill of review generally lies.

It lies for matter of error apparent on the face of the record.

What is such matter?

The error must appear on the decree and pleadings, for the evidence in the case at large cannot be examined to ascertain, whether the Court misstated or misunderstood the fact.

A bill of review also lies for newly discovered evidence material to the issue, if such evidence was not known until after the period in which it could be used in the cause.

Quere, if such newly discovered evidence must not be some written paper or evidence.

Quere, if newly discovered testimony of witnesses, going to confirm or to contradict the original testimony, is admissible.

No bill of review will lie, if the newly discovered evidence could have been obtained by reasonable diligence before the original hearing.

Quere, whether a bill of review lies upon new matter not in issue in the original cause; but which shows the decree erroneous.

It does not lie, where the party seeks to set out a new title, and not to support the title in the original cause.

A bill of review lies for the party who obtained the original decree in his own favour, if the original decree was injurious to him.

A bill of review lies for error in law only where the original decree is enrolled. If not enrolled, the remedy is a re-hearing.

All decrees in the Courts of the *United States* are deemed to be enrolled at the term in which they were passed.

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If the decree be not enrolled, a bill in the nature of a bill of review, and not strictly a bill of review for newly discovered evidence, lies.

The granting of a bill of review for newly discovered evidence is matter of discretion, and must be brought forward by petition to the Court.

Such a petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree.

It is not sufficient to state, that the petitioner expects to prove certain facts. He must state the exact evidence, to establish them.

On the hearing of such a petition affidavits may be admitted on each side, if necessary to explain the nature of the evidence.

Upon a bill of review for newly discovered evidence, the other party may controvert by plea or answer that it is newly discovered.

Petition of review, for matters of fact, denied upon all the circumstances of the case.

PETITION to file a bill for the purpose of obtaining a review of a decree, rendered in this Court at a former term, in the case of *Edward Dexter vs. Thomas Arnold*. (See *ante*, Vol. III. p. 284.)

The original bill, filed at the November Term, 1821, charged *Thomas Arnold*, as surviving partner, joint owner, trustee, and agent of his brother *Jonathan Arnold*, and as administrator upon his estate. Upon the bill, answer, and exhibits, an interlocutory decree passed, for the defendant to account upon oath, with directions to the master as to the mode of taking an account, and allowing the plaintiff to surcharge and falsify the stated accounts exhibited by the defendant. A report was made by the master at the June Term, 1823, and a final decree entered for the plaintiff at the following November Term, for five hundred dollars sixty-six and a half cents.

The grounds, presented by the petition for a review of that decree, were, the discovery of new facts showing, that several sums of money had come into the hands of the defendant, belonging to *Jonathan Arnold*, which were not entered in *Thomas Arnold's* accounts, nor allowed by the master, and that several claims, made by *Thomas Arnold* and allowed by the master, were without foundation and erroneous.

The counsel for the plaintiff made a particular statement of the several sums of money, which the plaintiff claimed should be added to the amount of the former decree in his favor, and of the new evidence to be produced to support his claim, and also

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of the several sums which should be deducted from the allowances made to the defendant, and of the new evidence to support these deductions, and made a call upon the defendant for the production of letters, accounts, &c.

Greene, District Attorney, contended, for the defendant, that this was not a case in which a bill of review could be sustained; that the original decree being in favor of the petitioner, and the ground, upon which a review of that decree was sought, being, that a less sum was decreed to the petitioner than he thought himself entitled to, the Court would at once dismiss the petition, in accordance with the rule laid down by elementary writers of high authority; that a bill of review would only lie in favor of the party against whom a decree was rendered. And he cited *2 Madd. Ch.* 539; *1 Harr. Ch.* 176; *Ch. Ca.* 51; *2 Freeman's Rep.* 182, 183.

Further, that if this position, which presented a positive bar to the granting of a bill of review in this case, could not be maintained, still, as the petitioner's claim was not one of strict right, but it was within the province of the Court, as a Court of Equity, to reject it, whatever might be its merits, if they thought that course, upon an examination of the circumstances, the most equitable for all the parties interested, the Court would refuse the petition without going into an examination of the character of the new facts set forth in it. The original bill was brought by the petitioner at such time as best suited his own convenience, and when he must be presumed to have been prepared to prove the allegations contained in it. The original respondent answered under oath all interrogatories put to him by the petitioner, and disclosed all matters relating to his accounts, about which any inquiry was made. His accounts were all carefully examined and audited by the master, under special instructions from the Court, the petitioner or his counsel attending, and being heard on any item excepted to. A report was made to the Court in favor of the petitioner, and a decree rendered thereon, as far back as

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the year 1823, to which no objection was made, or could be made, at the time of it. The original respondent has since then deceased; and now, after the expiration of four years from the rendering of that decree, the petitioner seeks to review it for the purpose of increasing the amount awarded to him, and to that end cites in the administratrix of the original respondent, who must be presumed to be, and in fact is, entirely unacquainted with all the matters in controversy, and incapable of making such explanations and producing such evidence, as the original respondent could readily have done were he still living. The counsel for the respondent contended, that, under circumstances like these, let the merits of the petitioner's case be what they might, the Court would take into consideration the great hardship, which the present respondent would suffer, if a review were allowed, and, exercising that discretion, which was wisely committed to them, they would reject the petition without examining the details of it.

But he further contended, that, if the Court should think proper to go into an investigation of the merits of the petitioner's case, there were certain well established principles of equity applicable to petitions for bills of review, to the spirit of which the petitioner's case must conform, or he could not succeed.

1. A bill of review may be filed upon newly discovered evidence, but the newly discovered evidence must be conclusive and relevant, such as a receipt, a release, &c. and not the mere accumulation of witnesses to a litigated fact. And he cited 3 *Johns. Ch. Rep.* 127; 3 *P. Wms.* 371; 2 *Mad. Ch.* 536; *Hard.* 342, 451.

2. That the affidavit of the petitioner must state the nature of the new evidence, in order that the Court may judge of its relevancy and materiality; and must also state, that the new matter could not have been produced or used before the decree. *Cooper* 92.

3. That a bill of review, upon matter of fact, must be upon special leave of the Court, and upon oath of the discovery of "new matter or evidence, which has come to light after the decree, and could not possibly be had or used at the time when the decree passed." 3 *Johns. Ch. Rep.* 126; 16 *Vez.* 348; *Cooper*, 91; 1 *Har. Ch.* 176; 2 *Mad. Ch.* 538, 520; 1 *Ball & Beatty* 142.

4. That a bill of review may be for error in law apparent on the face of the decree, as when an absolute decree is made against an infant, and cases of this kind; but not for an erroneous judgment. The error must be a palpable one. 2 *Mad. Ch.* 538; 17 *Vez.* 177; 2 *Johns. Ch. Rep.* 491.

5. That exceptions to a master's report cannot be assigned for error upon a bill of review. 1 *Har. Ch.* 175.

The counsel for the respondent then went into a minute examination of the particulars of the petition with reference to these principles, and contended that it could not be sustained.

Tillinghast, for the plaintiff, contended, that the preliminary objection, presented by the defendant's counsel in the nature of a bar to the petition, would not be considered by the Court as entitled to much consideration; that one or two ancient cases only were cited in support of it; and that, even if the circumstances of those cases were such as to sanction the principle to the extent, to which it was advanced by the defendant's counsel, still it was so inconsistent with those principles, which, in these times of improved equity, regulated investigations into the relative right of contending parties, that the Court would not adopt it upon the authority of those cases alone.

As to the second ground taken by the defendant's counsel, he contended, that this was not one of those cases, where the hardship was so entirely on the side of the defendant, that the Court would exercise the high discretion vested in it, of rejecting the petition without an examination into its merits; that this was a course, which would never be pursued by the Court, excepting

in extreme cases, and where the granting of a review would operate a great injury to the respondent, even if the issue of the case should be in his favor; that it was to be recollected, that the original defendant, *Thomas Arnold*, executed very important trusts in relation to the estate of his brother *Jonathan*; that it was his duty to execute these trusts with all fidelity and uprightness, and to make a just and true account of his doings when called upon; that all the documents, relating to the property in question, were in his possession, and all the facts, which it was important to the present petitioner to have made known on the former trial, were within his knowledge, and it was his duty then to have stated every thing important to a just knowledge and fair decision of the case; that if, for his own purposes, and to the injury of the petitioner, he then kept back facts which, if disclosed, would have produced a decree more favorable to the petitioner and more consonant with equity and justice, than the one actually rendered, his representatives ought not to deem it a hardship upon them, that whenever these facts should come to the knowledge of the original plaintiff, he should seek a revision of the original decree.

The counsel for the petitioner then went into an elaborate and minute examination of the particulars of the case.

STORY J. The present is a somewhat novel proceeding in this Circuit; and I am not aware, that, in any other Circuit of the United States, any general course of practice has prevailed, which would supercede the necessity of acting upon this, as a case of first impression, to be decided upon the general principles of Courts of Equity.

It comes before the Court upon a petition for leave to file a bill of review of a decree rendered in this Court at November Term, 1823, principally upon the ground of a discovery of new matters of fact. The petition was filed at November Term, 1827, and affidavits have been read in support of it. Counter

affidavits have also been admitted on the other side, not for the purpose of investigating or absolutely deciding upon the truth of the statements in the petition ; but to present, in a more exact shape, some of the circumstances growing out of the original proceedings, which may assist the Court in the preliminary discussion, whether leave ought to be granted to file the bill of review. This course, though not very common, is, as I conceive, perfectly within the range of the authority of the Court ;¹ and may be indispensable for a just exercise of its functions, in granting or withholding the review. If, indeed, it were doubtful, in case the bill of review should be allowed, whether the defendants could by plea or answer traverse the allegation in such bill, that the matter of fact is new, I should not hesitate to inquire, in the most ample manner, into the truth of such allegation, before the bill was granted, in order to prevent gross injustice. But as every such bill of review must contain an allegation, that the matter of fact is new, it seems to me clear upon principle, that, as it is vital to the relief, it is transversable by plea or answer, and must be proved, if not admitted at the hearing. In *Hanbury vs. Stevens*, (1784) cited by Lord Redesdale, (*Redesd. Pl. Eq.* 80) [3d edition, 70] the Court is reported to have held that doctrine. The case of *Lewellen vs. Mackworth* (2 *Atk. R.* 40 ; *Barnard, Ch. R.* 445) though very imperfectly, and, as I should think, inaccurately reported, seems to me to support the same conclusion. It has been relied on by the best text writers for that purpose.² Lord Redesdale, in his original work on Equity Pleadings, (*Redesd. Eq. Pl.* 80, 2d edition) stated the point, as one which may be doubted ; but upon principle I cannot see, how that can well be. And in the last edition

¹ See *Livingston vs. Hubbs*, 3 *Johns. Ch. R.* 124.—*Norris vs. Le Neve*, 3 *Atk.* 25.

² *Redesd. Pl. Eq.* 231, (3d edition.)—*Coop. Eq. Pl.* 305.—*Montague, Eq. Pl.* 335, note,—*Id.* 336.—2 *Montague, Eq. Pl.* 237, Note 100.

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(the third), revised by his Lordship, I find that he has questioned the propriety of such a doubt.³

Before I proceed to consider the particular grounds of the present petition, it may be well to glance at some of the regulations, which govern Courts of Equity in relation to bills of review, that we may be better enabled to judge of their application to the Courts of the *United States*. The ordinance of Lord *Bacon* constitutes the foundation of the system, and has never been departed from. It is as follows. "No decree shall be reversed, altered, or explained, *being once under the great seal*, but upon a bill of review. And no bill of review shall be admitted, except it contain either error in law, *appearing in the body of the decree*, without farther examination of matters of fact, or some *new matter*, which hath arisen after the decree, and *not any new proof, which might have been used, when the decree was made*. Nevertheless, upon *new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed*, a bill of review may be grounded by the *special license* of the Court, and not otherwise."⁴

A bill of review, therefore, lies only, when the decree has been enrolled under the great seal in chancery. If it has not been so enrolled, then for error of law apparent upon the decree the remedy is by a petition for a rehearing.⁵ But if the ground of the bill is new matter, discovered since the decree, then the remedy is by a supplemental bill in the nature of a bill of review, and a petition for a rehearing, which are allowed by special license of the Court.⁶ This distinction between a bill of review

³ *Redesd. Pl. Eq.* 70, (3d edition.)

⁴ *Beame's Orders in Chancery*, 1.

⁵ *Perry vs. Phelps*, 17 *Vez.* 173, 178.

⁶ *Redesd. Eq. Pl.* 65, [78,] 81.—*Coop. Eq. Pl.* 88, 89, 90, 91.—*Beames, Orders in Chan.* 2 & 3, notes.—*Sheffield vs. Duchess of Buckingham*, 1 *West. R.* 682.—*Montag. Pl. Eq. ch.* 12, p. 320.—*Norris vs. Le Neve*, 3 *Atk.* 26.—*Perry vs. Phelps*, 17 *Vez.* 173.—*Blake vs. Foster*, 2 *B. & Beatty*, 457, 460.

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and a bill in the nature of a bill of review, though important in *England*, is not felt in the practice of the Courts of the *United States*,—and perhaps rarely in any of the State Courts of Equity in the Union. I take it to be clear, that in the Courts of the *United States* all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the Term, in which they are passed. So that the appropriate remedy is by a bill of review.

In regard to errors of law, apparent upon the face of the decree, the established doctrine is, that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the Court upon an appeal. But taking the facts to be, as they are stated to be on the face of the decree, you must show, that the Court have erred in point of law.⁷ If, therefore, the decree do not contain a statement of the material facts, on which the decree proceeds, it is plain, that there can be no relief by a bill of review, but only by an appeal to some superior tribunal. It is on this account, that in *England* decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact for the decree.⁸ In the Courts of the *United States* the decrees are usually general. In *England* the decree embodies the substance of the bill, pleadings, and answers; in the Courts of the *United States* the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bill, answers, and other proceedings are, in our practice, as much a part of the record before the Court, as the decree itself; for it

⁷ *Mellish vs. Williams*, 1 *Vern. R.* 166.—*Cranborne vs. Delahay*, 2 *Freem. R.* 169.—*Combs vs. Proud*, 1 *Ch. Cas.* 54.—*S. C.* 2 *Freem. R.* 181.—3 *Rep. Ch.* 18.—*Hard. R.* 174.—*Perry vs. Phelps*, 17 *Vez.* 173.—*Obrien vs. Conner*, 2 *B. & Beatt*, 146, 154.

⁸ *Combs vs. Proud*, 1 *Ch. Cas.* 54.—*Brend vs. Brend*, 1 *Vern. R.* 214, —*S. C.* 2 *Ch. Cas.* 161.—*Bonham vs. Newcomb*, 1 *Vern. R.* 216.—*O'Brien vs. Conner*, 2 *B. & Beatt*, 146, 154.

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is only by a comparison with the former, that the correctness of the latter can be ascertained.

In regard to new matter, there are several considerations deserving attention. In the first place the new matter must be relevant and material, and such, as if known, might probably have produced a different determination.⁹ In other words, it must be new matter to prove what was before in issue, and not to prove a title not before in issue;¹⁰ not to make a new case, but to establish the old one. In the next place the new matter must have come to the knowledge of the party since the period, in which it could have been used in the cause at the original hearing. Lord *Bacon's* ordinance says in one part it must be, "after the decree:" but that seems corrected by the subsequent words, "and could not possibly have been used at the time when the decree passed," which point to the period of publication. Lord *Hardwicke* is reported to have said, that the words of Lord *Bacon* are dark; but that the construction has been, that the new matter must have come to the knowledge of the party *after publication passed*, (*Paterson vs. Slaughter, Ambler, R. 293.*) The same doctrine was held in *Norris vs. Le Neve*, (3 *Atk. R. 25, 34,*) and has been constantly adhered to since. A qualification of the rule quite as important and instructive is, that the matter must not only be new, but that it must be such as that the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief. That doctrine was expounded and adhered to by Lord *Eldon* in *Young vs. Keighley*, (16 *Vez. 348,*) and was acted upon by Lord *Manners* in *Barrington vs. O'Brien*, (2 *B. & Beatt, 140,*) and *Blake vs. Foster*, (2 *B. & Beatt, 457, 461.*) It was fully

⁹ *Bennett vs. Lee*, 2 *Atk. 529.*—*O'Brien vs. Conner*, 2 *B. & Beatt, 155.*—*Portsmouth vs. Effingham*, 1 *Vez. 429.*

¹⁰ *Coop. Eq. Pl. 91.*—*Patterson vs. Slaughter, Ambler. R. 292.*—*Young vs. Keighley* (16 *Vez. 348.*)—*Blake vs. Foster*, 2 *B. & Beatt. 457, 462.*

recognised by Mr. Chancellor *Kent*; and received the sanction of his high authority in *Wiser vs. Blackley*, (2 *Johns. Ch. R.* 488,) and *Barrow vs. Rhineland*, (3 *Johns. Ch. R.* 120.) And in the very recent case of *Bingham vs. Dawson*, (3 *Jac. & Walk.* 243,) Lord *Eldon* infused into it additional vigor.

Upon another point there is not perhaps a uniformity of opinion in the authorities. I allude to the distinction taken in an anonymous case in 2 *Freem. Rep.* 31, where the Chancellor said, that "where a matter of fact was particularly in issue before the former hearing, though you have *new proof* of that matter, upon that you shall never have a bill of review. But where a *new fact* is alleged, that was not at the former hearing, there it may be a ground for a bill of review." Now, assuming that under certain circumstances new matter, not evidence, that is, not in issue, in the original cause, but clearly demonstrating error in the decree, may support a bill of review, if it is the only mode of obtaining relief;¹¹ still it must be admitted, that the general rule is, that the new matter must be such as is relevant to the original case in issue. Lord *Hardwicke*, in *Norris vs. Le Neve*, (3 *Atk.* 33, 35,) is reported to have admitted, that a bill of review might be founded upon new matter not at all in issue in the former cause, which seems contrary to his opinion in *Patterson vs. Slaughter*, (*Ambler* 293),¹² or upon matter, which was in issue, but discovered since the hearing. But the very point in 2 *Freeman*, 31, (if I rightly understand it) is, that a newly discovered fact is ground for a bill; but not newly discovered evidence in proof of any fact already in issue. This seems to me at variance with Lord *Bacon's* ordinance, for it is there said, that there may be a

¹¹ See *Norris vs. Le Neve*, 3 *Atk.* 33, 35.—*Roberts vs. Kingsley*, 1 *Vez.* 238.—*Earl of Portsmouth vs. Lord Effingham*, 1 *Vez.* 429.—*Redesdale, Eq. Pl.* 67, &c. (last edition.)—1 *Montag. Pl. Eq.* 332, 333.—*Wilson vs. Webb*, 2 *Cox*, 3.—*Standish vs. Radley*, 2 *Atk.* 177.—See also Lord *Redesdale's* observations in his third edition of his *Equity Pleadings*, p. 67.

¹² See also *Young vs. Keighley*, 16 *Vez.* 348, 354.—*Blake vs. Foster*, 2 *B. & Beatt*, 457, 462.

review upon "new matter, which hath arisen in time after the decree," and also "upon *new proof*, that has come to light after the decree made, and could not possibly have been used at the time when the decree passed." It is also contrary to what Lord *Hardwicke* held in the cases cited from 3 *Atk.* 33, and *Ambler*, 293. Lord *Eldon*, in *Young vs. Keighley*, (16 *Vez.* 348, 350,) said, "The ground [of a bill of review] is error apparent on the face of the decree, or new *evidence* of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority, that *new evidence* would not be sufficient ground." That was also the opinion of Lord *Manners* in *Blake vs. Foster*, (2 *B. & Beatt.* 457.) Mr. Chancellor *Kent*, in *Livingston vs. Hubbs*, (3 *Johns. Ch.* 124,) adopted the like conclusion; and he seemed to think, that such new evidence must not be a mere accumulation of witnesses to the same fact; but some stringent written evidence or newly discovered papers. *Gilbert*, in his *Forum Romanum*, ch. 10, p. 186, leans to the same limitation, for he says, that in bills of review, "they can examine to nothing, that was in the original cause, unless it be matter happening subsequent, which was not before in issue, or upon matter of record or writing not known before, for if the Court should give them leave to enter *into proofs* upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury."¹³ There is much good sense in such a distinction, operating upon the discretion of the Court in refusing a bill of review, and I should be glad to know, that it has always been adhered to. It is certain, that cumulative written evidence has been admitted;

¹³ See also *Barton, Eq.* 216.—*Tobers vs. Young, Prec. Ch.* 193.—*Taylor vs. Sharp*, 3 *P. Will.* 371.—*Standish vs. Radley*, 2 *Atk.* 177.—*Chambers vs. Greenhill*, 2 *Chan. Rep.* 66.—*Thomas vs. Harvie's Heirs*, 10 *Wheaton R.* 146.

and even written evidence to contradict the testimony of a witness. That was the case of *Attorney General vs. Turner*, (*Ambler*, 587.) *Willan vs. Willan* (16 *Vez.* 72, 88) supposes, that new testimony of witnesses may be admissible. If it be admissible, (upon which I am not called to decide,) it ought to be received with extreme caution, and only when it is of such a nature as ought to be decisive proof. There is so much of just reasoning in the opinion of the Court of Appeals of Kentucky on this subject, that I should hesitate long before I should act against it.¹⁴

In the next place it is most material to state, that the granting of such a bill of review is not a matter of right, but of sound discretion in the Court.¹⁵ It may be refused, therefore, although the facts if admitted would change the decree, where the Court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. *Bennet vs. Lee*, (2 *Atk.* 528,) *Wilson vs. Webb*, (2 *Cox*, 3,) and *Young vs. Keighley*, (16 *Vez.* 348,) are strong exemplifications of the principle.

These are the principal considerations, which appear to me useful to be brought into view upon the present occasion. Let us now advert to the grounds upon which the petition is framed, and see how far any are applicable to them.

The original bill was brought against *Thomas Arnold* (whose administrator is now before the Court) for an account and settlement of his brother *Jonathan Arnold's* estate, upon which he had administered. The case is reported in the third volume of Mr. *Mason's* Reports, page 284, and I refer to that for a summary of the proceedings and final decree.

¹⁴ See *Respass vs. McClanahan*, *Hardin, Ky. R.* 342.—*Head vs. Head*, 3 *Marsh, Ky. R.* 121.—*Randolph's Executors vs. Randolph's Executors*, 1 *H. & M.* 180.

¹⁵ *Sheffield vs. Duchess of Buckingham*, 1 *West.* 682.—*Norris vs. Le Neve*, 3 *Atk.* 33.—*Gould vs. Tuncred*, 2 *Atk.* 533.

In preferring the present petition, the proper course of proceeding has been entirely mistaken. The present counsel for the petitioner is not responsible for those proceedings, they having taken place before he came into the cause. A petition for leave to file a bill of review for newly discovered matter should contain in itself an abstract of the former proceedings, the bill, answers, decree, &c. and should then specifically state what the newly discovered matter is, and when it first came to the party's knowledge, and how it bears on the decree, that the Court may see its relevancy and the propriety of allowing it.¹⁶ The present petition, in its original form, contained nothing of this sort, but referred to an accompanying bill of review, as the one, which it asked leave to file, and then simply affirmed the facts stated in it to be true. This was sufficiently irregular. But upon looking into this bill of review the grounds of error are stated in a very loose manner, and in so general a form as to be quite inadmissible.

The first error assigned is in matter of law, and it is, that *Thomas Arnold*, the administrator, ought to have been charged with interest upon all sums of money, which he had received as administrator, because the said sums were used by him. The master in his report had declined to allow interest; and upon an exception taken the Court confirmed his report on this point. I see no reason for changing the decree on this point, for the reasons stated in the cause in 3 *Mason*, 288, 290; and there is no pretence to say, that there is any such proof of the use of the money in the report of the master, as justifies a different conclusion. There is no error in this respect apparent on the face of the master's report, or the decree. The allowance or disallowance of interest rests very much upon circumstances, and slight errors in this respect are not always held fatal.¹⁷ There is no error apparent, therefore, on which a review ought to be granted.

¹⁶ *Coop. Eq. Pl.* 92.¹⁷ See *Gould vs. Tancred*, 2 *Atk.* 533.

The next ground assigned is, that *Thomas Ardold* did receive large sums of money and other property, which he has not accounted for before the master, and for which he ought to account; and that since the decree, the petitioner hath discovered new and further evidence in relation thereto, which would have materially changed the report of the master and the decree. The petition does not state what the new evidence is, nor when discovered, and it is quite too vague for any order of the Court. The bill then proceeds, very irregularly, to require, that the administrator of *Thomas Arnold* should answer certain interrogatories as to the cargoes of the ship *Friendship*. It then states, that *Thomas Arnold* received six shares in the *Tennessee Land Company*; and that he received 8,000 dollars on a policy of insurance on the brig *Friendship*; and that he received large consignments of property from *Vincent Gray* in *Cuba* in bills of exchange, &c. belonging to *Jonathan's* estate; and finally, that he received divers other large sums of money as agent of *Jonathan*. Now, it must be manifest, that upon allegations so general and indistinct no bill of review would lie. Here is no assertion of newly discovered evidence to maintain one. Such a bill, so framed, ought never to be allowed by a Court acting upon the correct principles of Chancery jurisdiction.

Afterwards, an amendment of this bill of review was filed, containing more distinct specifications of new matter, most of which, however, as I shall have occasion to notice hereafter, are open to the same objections as those already stated.

But the radical objection to both bills is, that they are improperly introduced into the cause at all. A bill of review can only be filed after it is allowed by the Court, and upon the very grounds allowed by the Court. The preliminary application by petition to file it should state the new matter shortly, distinctly, and exactly, so that the Court may see how it presses on the original cause; and it is not permissible to load it with charges and allegations, as in an original seeking bill in equity. In the sense of

a Court of Chancery there is not before this Court any sufficient petition, upon which it can act.

But as the proceeding is a novelty in this Circuit, much indulgence ought to be allowed to the original counsel in the cause (for the present counsel is not at all chargeable) for irregularities of this nature, upon the first presentation of the practice. I advert to the posture of the cause, therefore, not so much with an intention to subject it to close criticism, as for the purpose of declaring, that, even if I could gather from the papers, that there is matter, upon which a bill of review would lie, it is not before the Court in such a shape, that the Court could judicially pass an order of allowance.

The case has, however, been argued, and with great ability, upon its merits; and waving for the present any farther reference to the form of the proceedings, I will proceed to the consideration of the points made at the bar.

The first point is one made by the defendant, and being preliminary in its nature, must be disposed of before the plaintiff can be farther heard. It is said to be a rule in equity, that where a party has less decreed to him than he thinks himself entitled to, he cannot bring a bill of review; for that lies only in favour of a party against whom there is a decree. For this the opinion of elementary writers,¹⁸ and the case of *Glover vs. Partington*, (2 *Freeman R.* 183; *S. C.* 2 *Eq. Abrid.* 174,) is cited. The case, as here reported, certainly supports the doctrine. But it appears to me, that, if the doctrine is correct, it is so only in cases, where there is no error apparent on the face of the decree, and no newly discovered matter to support a bill of review, for then the proper remedy is by appeal. If there be no such remedy by appeal, but only by bill of review, it would be strange, if a material error could not be redressed upon such a bill by the party to whom it had been injurious; that if a man

¹⁸ 2 *Madd. Pr.* 412.—1 *Harris. Pr.* 86.

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had 10,000 dollars due him, and had a decree for 100 dollars he was conclusively bound by an error of the Court. The decision, reported in 2 *Freem. R.* 182, was made by the Master of the Rolls, who allowed the demurrer ; but from the report of the same case in 1 *Ch. Cas.* 51, it appears, that it was afterwards reheard before the Lord Chancellor and Baron *Rainsford* ; and the demurrer was *overruled*.¹⁹ So that the final decision was against the doctrine for which it is now cited. And Lord *Nottingham*, a few years afterwards, in *Vandebende vs. Levingston*, (3 *Swanst. R.* 625,) resolved, that the plaintiff may have a bill of review to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been. We may then dismiss this objection.

We may now advance to the examination of the points made by the petitioner in support of his petition for a review, assuming that the amended bill of review is to be received, *pro hoc vice*, as such a petition. I have already stated, that it is utterly defective in the essential ingredients of such a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered. It is not sufficient to say, that the petitioner expects to prove error in this or that respect : or that he has discovered evidence, which he hopes will establish this or that fact. But he must state the exact nature and form of the evidence itself, and when discovered. If written evidence, it must be stated, and its direct bearing shown. If of witnesses, what facts the witnesses will prove ; and when the party first knew the nature of their testimony. It is impossible otherwise for the Court to judge, whether the evidence is decisive, or is merely presumptive or cumulative ; whether it goes vitally to the case, and disproves it, or only lets in some new matter, confirmatory or explanatory of the transactions in the former decree. The party must go farther, and establish, that he could not, by reason-

¹⁹ See *S. C.* cited *Com. Dig. Chancery*.—*G.* to the same effect.

able diligence before the decree, have procured the evidence. Now, in every one of these particulars, the amended bill, *quasi* a petition, is extremely deficient. I have looked it over carefully, and cannot find, that it points out a single written paper, which disproves the original case, or names a single witness, whose testimony, if admitted, would overturn it. It deals altogether in general allegations, that certain things are expected to be proved ; and, like an original bill, proceeds to ask a discovery from the defendant of letters and papers in her possession as administrator, relative thereto. There are indeed, in the accompanying affidavits, some papers produced and relied on ; but they cannot supply the defects of the original petition.

1. The first charge is in effect, that *Thomas Arnold*, as administrator of *Jonathan Arnold*, received certain property from *Vincent Gray* in *Cuba*, belonging to *Jonathan's* estate, which he has never inventoried or accounted for. The specifications under this head are, (1.) The receipt of 40 boxes of sugar, upon which charges were paid out of *Jonathan's* estate, amounting to \$190 : (2.) The remittance of a bill to *Thomas Arnold*, drawn by *Andrew Davis* on *William Davis, Philadelphia*, for \$1222 : (3.) The receipt by Captain *Mathewson* of \$500. All these transactions took place in the year 1808, *Jonathan* having died in June, 1807.

Now, the original bill charged a partnership between *Jonathan* and *Thomas*, and asked for an account and settlement of the partnership concerns, as well as of the administration. After the answer it was referred to a master to take the accounts, and he made a report accordingly, after hearing the parties many times. In the hearing before the master, the accounts with *Vincent Gray* were in controversy between the parties, and *Thomas Arnold* was interrogated as to the whole subject, and made his disclosures. So that the existence of an account with *Gray*, and the dispute, as to the receipts from him on account of *Jonathan's* estate, was matter of examination before the master.

There is no pretence, that the residence of *Gray* was not well known ; or that the plaintiff could not at that time, by reasonable diligence, have obtained his testimony, if he had desired it. He does not show, that he made any effort to obtain it ; and if he had, the very papers now produced would have been obtained. What then is the posture of the case ? The plaintiff goes on to a decree without seeking for evidence, though within his reach, and contents himself with such explanations as the defendant then gave ; and now, after the lapse of several years, the defendant being dead, asks this Court to grant him a bill of review for errors in the account, which ordinary diligence would have rectified at that very time. If such a course should be allowed, it would furnish a perfect immunity for the grossest negligence. According to my understanding of the principles, upon which bills of review are granted, this Court, under such circumstances, is not at liberty to grant it. In *Bingham vs. Dawson*, (3 *Jac. & Walk.* 243,) Lord *Eldon* refused to allow a bill of review under far less cogent circumstances, deeming it a most mischievous practice ; and Mr. Chancellor *Kent* acted most deliberately to the same effect in *Livingston vs. Hubbs* (3 *Johns. Ch. R.* 124.)

But as to the matter of fact ; Mr. *Gray's* letters show, that the 40 boxes of sugar belonged to *Thomas Arnold*, and not to *Jonathan Arnold*, thus establishing the incorrectness of this part of the petitioner's case, and leaving only the \$190 in his favour. Then, as to the bill on *Davis ; Thomas Arnold*, on his examination before the master, expressly stated, that it had never been paid, *Davis* being insolvent. And there is not a tittle of new evidence, now offered, to show that he did receive it. It is therefore a mere effort to rehear the original cause on this point. Then, as to the 500 dollars received by *Mathewson*. In the report 270 dollars is credited to *Jonathan's* estate on this account ; and the only question is, whether the remaining 230 dollars ought to have been credited. Mr. *Gray*, in his letters, (which, by the by, are mere statements now made, and not originals written at

the time of the transactions, and are not sworn to by him,) does not pretend to any absolute certainty, as to the parties to whom the money belonged. He says in that of the 14th of April, 1826, that he had received of *De la Motte* \$1984, part of which he remitted to *Thomas Arnold* by the bill drawn on *Davis*. He did not then recollect how, or when, the balance was remitted. In his letter of the 14th of April, 1827, he states, that on examining his old accounts, &c. he finds, that he passed to the credit of the ship *Tyre*, *Mathewson*, master, for account of *Thomas Arnold*, in July 1808, \$230, and in September of the same year, \$270, in all 500 dollars; and he *presumes*, that this was the balance then collected. In his letter of the 27th of February, 1828, he adds, that the money, collected of *De la Motte*, belonged to *Jonathan Arnold*, and that the bill on *Davis*, the \$500, the \$190, and his commissions, made up the whole sum. Such is the explanation given by Mr. *Gray*, at the distance of 20 years after the original transactions; and it is too much to say, that his recollections, after such a length of time, ought to overturn the solemn proceedings before the master. It is, at best, testimony only of a presumptive character, cumulative in its nature, to a litigated fact, and, if admissible at all, as a ground for a review, is open to the suggestion of possible mistake. But it does so happen, that there is before the Court a letter of Mr. *Gray* to *Thomas Arnold*, written on the 12th of April, 1808, (and which, there is much reason to believe, was, among other papers from him, laid before the master upon the hearing,) which may fairly lead to the belief, that *Gray* is now mistaken in supposing, that the money belonged exclusively to *Jonathan Arnold*. That letter begins by saying, "I have liquidated *your accounts* with *Don Pablo de Motta*, and taken the acceptance on the widow *P. & H.* for the balance due, &c. for 2088 dollars $3\frac{1}{2}$." It then goes on to state, that Mr. *Barker*, of *Charleston*, has requested him to pay into his hands the money received from *De la Motte*, which he declined. It then adds, "On examination of the ac-

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counts, if any thing should appear *to be due to Mr. Barker* over and above the 1000 dollars heretofore received, I will remit it to him, or pay it into the hands of Mr. Bower. However, as you know better than I do, *what sum ought to be paid to Mr. Barker, I wish you to settle the amount with him.*" If any thing is clear, from this language, it is, that Mr. Barker had, or was supposed to have, an interest in this very fund, and that *Thomas Arnold* was called upon to discharge it. And the first words in the letter, "*your accounts,*" seem to indicate, that *Thomas Arnold* also might have a personal interest in the fund. If Mr. Barker had an interest, what proof is there, that it did not amount to the 230 dollars, now sought to be credited in *Jonathan's* account? After this, what safe reliance can be placed upon Mr. Gray's recollection as to the \$190 being paid out of the funds of *Jonathan Arnold* in his hands? It is certain, that, at that very time, he was collecting money for *Thomas Arnold*. The letter of instructions to *Mathewson*, in 1808, shows, that money was to be collected on the personal account of *Thomas Arnold*, as well as on account of *Jonathan Arnold's* estate. And Mr. Gray is certainly mistaken in supposing it was credited to the brig *Tyre*; for it was credited to the brig *Perseverance*. I do not mean to cast the slightest imputation upon this gentleman's credit. I do not doubt, that he relates the transactions, as he now supposes them to have been. But with the most perfect respect for his veracity, it is not too much to say, that, after such a length of time, no Court would be safe to grant a bill of review upon such proofs, at once inconclusive and unsatisfactory. It is to be remembered, that the case stands here very differently from what it would on an *original* bill. Here, the *onus probandi* is on the petitioner to establish the error, and it must be proved by newly discovered evidence or facts, to entitle him to a review. Great reliance has been placed, at the argument, upon *Moore vs. Moore*, (2 *Vez.* 596,) as a case of relief founded upon analogous principles. Without doubt, if a substantial error

is conclusively ascertained by newly discovered evidence, that furnishes a ground for a review. But that case was not like the present. There *John Moore* was made a party to a bill for an account, as one of the executors of *C. M.*; and the plaintiffs insisted, that he acted as executor. That was not proved; and therefore he *was not decreed to account* as executor, and he refused to account. Afterwards it was discovered, that he had received £2500 mortgage money of the testator's estate. Lord *Hardwicke* thought this was proper matter of review; and that *Moore* ought to have disclosed the fact on his original answer, although he had not acted generally as executor. Now, there was nothing in this case to put the plaintiffs upon any inquiry as to any mortgage. They asked for an account generally of the testator's estate from his executors, in order to have a decree for their legacies. It would have been different, if the very mortgage had been in controversy between the parties, and brought out upon the account.

2. The next charge is, that in the account settled on the 31st of March, 1801, between *Thomas Arnold* and *Jonathan Arnold*, there was debited an item for one half of the premium on the schooner *Fame*, on her voyage home, of 180 dollars and 12 dollars interest, in all 192 dollars; which it is now said is erroneous, because no such insurance was made, or premium paid, the vessel and her cargo being then insured out and home, by the *Providence Insurance Company*, for more than the value of both. One of the charges, in the original bill, was of errors in the settlement of this very account; and upon the hearing, the Court decreed, that the account should stand, subject to any surcharge and falsification by the plaintiff. Of course, this item was open for contestation before the master. It was confirmed, as to this item, by the master; and if the Court now reviews it, it undertakes, after a lapse of 28 years and the death of both parties, to open a settled account upon a mere presumption of mistake, founded upon a very imperfect knowledge of the real circum-

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stances. *Thomas Arnold* was liable to examination before the master for every item in his account. He might have been inquired of, as to the facts, where the insurance was made, and when the premium was paid; and as to all other material circumstances. The petitioner waived such inquiry in the very case, in which he was keenly on the scent to discover errors. It does not appear, that he made any inquiry, or was misled by any attempted misrepresentation or concealment on this head. If he then used no reasonable diligence in the matter, then before him, it must be a strong case to justify an interposition of the Court now in his favour.

But what is the newly discovered evidence to falsify the item? It now appears, that by a policy underwritten on the 24th of July, 1800, by the *Providence Insurance Company*; *Thomas Arnold* for *Jonathan Arnold, Barker & Lord*, and *James Schmeibar*, caused insurance to be made of 9000 dollars on the schooner *Fame* and cargo, viz. 7000 dollars on the cargo, and 2000 dollars on the vessel, from *Charleston* to *Martinico*, at and from thence to any one port in the *United States*, at a premium of 17 per cent.; with liberty to proceed from *Martinico* to any other port or ports in the *West Indies*, by adding *three per cent.* for every *English* windward port, and *five per cent.* for every other port. Upon the back of the office copy of the policy is the following indorsement. "October 26. Received information of her safe arrival at *Charleston*; touched at *Trinidad* and *St. Thomas*; for which add 8 per cent. to the premium. Return 9 per cent. on \$—— deficiency of cargo from *St. Thomas*." This indorsement was doubtless made by the proper officer of the Insurance Company; but what settlement was actually made does not appear by any competent evidence. It appears, however, from *William Holroyd's* papers, that *Barker & Lord* were charged in settlement by *Thomas Arnold* with one half of the premium of the cargo of the *Fame*, \$986,48; and the other half of the premium on the same cargo, viz. \$986,48, was charged to *Jonathan Arnold*, in

the above account, settled in March, 1801. It is impossible, I think, from such facts alone, to ascertain, whether the charge of the 192 dollars for premium on the vessel *home* was correct or not; *non constat*, that there might not have been another policy, on which it was paid. The very terms of the charge suppose it to be a premium, not for the whole voyage, but for the return voyage only. Besides, it does not appear from this policy, or the other papers, that *Barker & Lord* had any interest in the vessel. The charge against them is for premium on *cargo* only; and if they had had any interest in the vessel, and the sum charged included both, it would probably have been mentioned. The very circumstance, that there is a distinct charge of the premium on the *vessel*, following that of the *cargo*, which is stated to be settled with *William Holroyd*, in the account of March, 1801, is strong presumptive proof, that *Jonathan Arnold* was the sole owner of the vessel. And this is quite compatible with the terms of the policy of insurance. And, after all, the conjecture of the counsel may be well founded, that the settlement under the policy, whatever it was, was by compromise. Who can say, after such a length of time, when the transactions are involved in so much obscurity, that he now understands them better than the parties did at the time, when they were fresh in their minds, and were settled in their accounts? There would be, as I think, much rashness in such an assertion. But, supposing there might be some doubt, is that a ground for unraveling an intricate, settled account, after such a lapse of time? Was there ever a bill of review maintained under such circumstances, especially, when a prior decree had given the party leave to surcharge and falsify? In short, can it be endured, that a bill of review should be allowed, but upon proofs, which, standing alone, would overturn the decree, and would be conclusive on the point? Ought they not to be direct, plain, unequivocal?

The next item is a supposed error in the account settled in March, 1801, where *Jonathan Arnold* is charged with the pay-

ment of \$2267,82, principal and interest on his note to *Joseph Rogers*. It is now said, that by newly discovered evidence the petitioner can show, that only \$1693,95 was in fact paid on that account; and for the payment of this, *Thomas Arnold* had, in 1798, bills, the property of *Jonathan*, to the value of £800 sterling, which he had used and enjoyed the interest of. Many of the remarks already made apply with increased force to this item. In the first place, there is a settled acknowledgment between the parties, that the sum is right, and the note was paid. In the next place, as to the bills of exchange. They are duly credited and admitted in the same account, as correctly applied. How then can we say, that they were used differently from what the parties intended? There is no new evidence, as to these bills; and they were included in the report of the master. But what is the new evidence now suggested as to the item of \$2267,82? It is simply this. Mr. *William Holroyd* was agent of some sort for *Rogers*, (we do not know how far,) and in his books (for he is dead) there are now found two credits to *Joseph Rogers*, one, under date of October 5, 1799, of \$600, "received from *Thomas Arnold* in part of *Jonathan Arnold's* note;" the other under date of November 9, of the same year, of "amount of *Thomas Arnold's* note, \$1100, deduct discount, \$6,05, viz. \$1093,95," making together the amount of \$1693,95. No other credits appear on *Holroyd's* books. *Rogers* is also dead, and in his books no other credits can be found in his accounts with *Holroyd*; and what is curious enough, the credit of \$600 is stated to be "cash in part of *T. Arnold's* note," and not of *Jonathan's*. And in *Rogers's* cash account even the whole of these sums is not credited. What then is the plain amount of this evidence? not, that *Thomas Arnold* never paid the sum of \$2267,82 on *Jonathan's* note; but that the payments cannot be distinctly traced, at this distance of time, in either *Holroyd's* or *Rogers's* books. And suppose they cannot. Is a settled account to be opened, because third persons, to whom payments have been

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made, omit to keep correct books, or enter full credits? Is their omission to prejudice the rights of others; and to overturn the deliberate settlements of parties? Are we to indulge in presumptions, that the parties did not know their own concerns, and that there has been fraud or mistake, because we cannot now trace back the origin of payments acknowledged by them? What proof have we, that the sums stated in these books were payments on account of the very note charged in the settlement? The payment of \$1093,95 purports to be on *Thomas's* note; how can we say, that it was on *Jonathan's*? The Court is, then, called upon to re-examine this account upon mere surmises and conjectures; and the petitioner now demands, that the original note of *Jonathan* should be proved to verify the payment, exactly as if this were an original bill for an account, and a discovery. The original bill sought to set aside the settled accounts; leave was given to surcharge and falsify; and after a decree confirming the account, a discovery is sought upon new evidence of the loosest texture, and most inconclusive nature. The evidence, such as it is, was open to the plaintiff at the original hearing, if he had chosen to look for it, and by reasonable diligence it might then have been obtained, as well as now. If it had been obtained, I think it would have come to nothing. But as a foundation of a bill of review it is wholly inadmissible. I observe too, that the master states, that this very item was in controversy before him; and that *Holroyd's* books were examined for the purpose of explaining one or more payments to *Rogers* by *Thomas Arnold* on *Jonathan's* account.

The next item is, that there was an insurance at *Malaga*, of \$8000, on the brig *Friendship's* cargo, from that port to the *Mediterranean* and home; that she was captured in 1797 on the voyage home; and that one half of this cargo belonged to *Jonathan*, and therefore half of the insurance ought to be credited to him. Now, this very item was not only in controversy before the master, (as he states,) but it was made the subject of a

special interrogatory in the original bill, and a discovery prayed. *Thomas Arnold*, in his answer, expressly stated, that he had no knowledge of any insurance at *Malaga*; but had been informed, that there had been a policy there procured by Captain *Proud* (the master), on the cargo from *Malaga* to *Genoa* only; and as that risk terminated without loss, and the vessel was captured afterwards on her voyage home, he never received any thing on that insurance. Here, then, the petitioner was bound to use reasonable diligence, if he did not choose to rely upon the statement in the defendant's answer, and subsequent examination before the master. But he never sent to *Malaga*; and never made any search for Captain *Proud* or his papers. Captain *Proud* is now dead. There is not now the slightest proof, that any money ever was received from the insurance in *Malaga*. The petitioner now calls upon the other party for a discovery, exactly as he did in the original bill; not because any new fact has come to his knowledge since the decree; but because he has now discovered an old letter, unsigned and unfinished, in the handwriting of Captain *Proud*, (which does not appear ever to have been sent to the owners,) in which a suggestion is found about insurance made, or to be made by him, on cocoa (part of the cargo), up the *Straits*, and advising the owners to procure insurance on the vessel from *Malaga* home. The letter is exceedingly obscure in its terms, and it is utterly impossible to ascertain, what were the precise terms or nature of the insurance; though I should conjecture from its language, that it was limited to the cargo from *Malaga* to *Genoa*. If so, it stands completely in harmony with the original answer, and supports it. But if it were otherwise; what ground is here laid for a review? The paper, if newly discovered, is not evidence; and it establishes no receipt of any money by *Thomas Arnold* on the insurance, which is the material fact. A bill of review is not a bill for a discovery; but a bill founded upon a discovery already made of evidence material and decisive to the issue.

The next charge is, that in the master's report an allowance is made for a note of *Jonathan Arnold* to *Minturn & Champlin*, indorsed by *Thomas Arnold*, and by him paid to *Joseph Jenkins*, viz. \$824,12½; whereas *Minturn & Champlin* had received 32 bags of pimento belonging to *Jonathan*, and had sold the same for \$253, and applied the proceeds towards the discharge of the same note. It is sufficient to say, that there is no proof to this effect; nor any newly discovered evidence offered to support the statement. No reason is pretended, why *Minturn & Champlin's* accounts were not investigated at the original hearing.

The next charge is, as to the *Tennessee Land Company* shares, owned by *Jonathan Arnold*, the proceeds of which have been received by *Thomas Arnold*. The whole number owned by *Jonathan* was fifteen; *Thomas* accounted before the master for nine shares, as all received by him. The petitioner had the most ample means, by a search in the proper public office at *Washington*, to have ascertained the whole amount received by *Thomas* on the shares, if he had used any diligence. The case, therefore, falls precisely within the doctrine of Lord *Eldon* in *Bingham vs. Dawson* (3 *Jac. & Walk.* 243.) But the receipt, now produced from the public records at *Washington*, signed by *Samuel Dexter*, satisfactorily establishes, that *Jonathan* had long before sold the six shares, now in controversy, to *Dexter*. And that was the very explanation asserted before the master by *Thomas Arnold*. There is not a shadow of proof, that he ever received on these shares any money, which he has not accounted for.

I pass over the next charge, which respects the £100 note, included in the mortgage on the *Paget* farm. It was disposed of upon an exception of the plaintiff in the former decree, which is reported in 3 *Mason, R.* 284, 286. No new evidence on this point is pretended.

The next item is for an allowance made out of *Jonathan's* estate in the master's report of the sum of \$4800 and upwards.

due from *Jonathan's* estate to the estate of *Welcome Arnold*, and secured by a mortgage given by *Jonathan* to *Thomas Arnold*, as administrator of *Welcome*, and which was allowed him upon his agreeing to cancel the mortgage, which he has not done, but refused ever afterwards to do. The mortgage appears to have been given to *Samuel G. Arnold*, as attorney of *Thomas Arnold* and *Patience Arnold*, administrators of *Welcome Arnold*. I agree, that it was the duty of *Thomas Arnold* to procure a cancellation of that mortgage after the credit was allowed, whether he made an express promise to do so, or not. If he had a right of retainer, as administrator on both estates, he had a right to the credit allowed in settling the account. It was not matter of exception, at that time, that it was done; and it furnishes no ground of review now. The proper remedy is by an original bill to compel satisfaction to be entered on the mortgage, and a re-delivery or cancellation of it. To such a bill the administratrix of *Thomas Arnold* might be properly made a party, at least for the purpose of compelling an application, or re-payment of the sum credited, if the mortgage deed is not cancelled, and the credit has not been already made to *Welcome's* estate. If such a suit should be unproductive, I do not mean to say, that there might not be circumstances, upon which this Court might give leave for a bill of review, in order, that the credit might be struck out, if *Jonathan's* estate was to sustain a real injury, as if possession under the mortgage was insisted upon, and held at law under the mortgage. At present I do no more than say, that the matter now presented furnishes no such ground.

I have thus gone over all the principal grounds for the bill of review, supposing them to be before the Court with all due distinctness and particularity, and in a shape regular and tangible, If I had more leisure I might comment, somewhat more at large, upon the principles applicable to this subject. But it being my deliberate judgment, that the case is not a fit one for a review, I content myself with ordering, that the petition be dismissed with costs.

Cassels, Adm'r vs. Vernon, Ex'r.

The District Judge concurs in this opinion, and therefore let the petition be accordingly dismissed.

JOHN CASSELS, ADMINISTRATOR OF JANE CASSELS

vs.

WILLIAM VERNON, EXECUTOR OF SAMUEL BROWN AND ANOTHER.

The grant of administration to a husband on his wife's estate with the will annexed, by a Probate Court, is conclusive to establish her right to make the will, for the general jurisdiction includes the right to inquire into this fact.

Interest will not be allowed against a Trustee holding a fund, when he had made no interest, if there be no laches or neglect, or use of the money, on his part.

BILL in Equity for an account. The cause was set down by consent of parties upon the bill, answers, exhibits, and admissions of the parties, and was argued by *Samuel A. Crapo* and *Philip Crapo* for the plaintiff, and by *Searle* for the defendant.

STORY J. The present bill is brought by *John Cassels*, as administrator with the will annexed of his late wife, *Jane Cassels*, deceased, against the defendant as executor of *Samuel Brown*, deceased, for an account and decree of payment of a certain trust fund belonging to her estate, entrusted during her lifetime to the defendant's testator for her use. Mrs. *Cassels* died in *England*, where her will was duly proved in the Prerogative Court of *Canterbury*, and administration thereon granted to the plaintiff in 1828; and he has since presented the same to the proper Probate Court of *Rhode Island*, by which administration has been granted to him in like manner. The will of Mrs. *Cassels* purports to have been made in virtue of a power reserved to her by a certain bond, executed before her marriage by the plaintiff to a Mr. *Champlin* of *Newport*, the object of which was to

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secure to her the absolute disposal of her whole estate. Her will purports to dispose of her real and personal estate, first, to her husband for life, with a power to him afterwards to appoint and distribute the same among their children; and in default of such appointment, an equal distribution among their children, who should survive him, and if none survived, then to his own use in fee.

There is no dispute between the parties as to the sum now due to Mrs. *Cassel's* estate; and the defendant makes no objection to paying it, provided he can be secure in so doing. It will be necessary, therefore, only to consider, whether either of the objections taken at the argument furnishes any solid ground for a denial of relief.

The first objection is, that the plaintiff has united in his bill a claim for the money as administrator of Mrs. *Cassels*, and also a claim for the same in his individual capacity, meaning probably, though not so stated in the bill, as husband of the deceased. It is very properly stated, that these claims are inconsistent with each other, and that an admission of the one necessarily supercedes the other. The allegation, however, of a right in his individual capacity, is sustained by no facts alleged in the bill, and indeed is a mere naked assertion in the introductory part of the bill, in which, after stating his representative character, the bill adds, "and also in his private and individual capacity." The bill is certainly incorrect in this union of inconsistent claims; and if the objection had been taken upon demurrer, it would have overthrown the bill, unless an amendment was allowed. Courts of Equity will not permit distinct and independent titles to be set up in the same bill, for that would be to allow multifariousness; much less will it permit inconsistent titles, or alternative titles, for that might tend to very inconvenient consequences in point of evidence. It is the duty of the party, who seeks the assistance of the Court, to state his own title directly, without any alternatives, and not to put the Court upon the duty to select, out of

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many, any one, which it may ultimately think, upon the evidence, can be supported.¹ This difficulty, however, could have been gotten rid of by an amendment; and coming on after a full answer, and a hearing by consent of parties, the shortest course will be to dismiss the bill as to all claims, except that made in the representative character. I do not say, that this is quite regular; but upon a mere slip, not affecting the rights of the parties, and where I should certainly allow an amendment, it seems hardly worth while to put the parties to the expense of a new bill. Unless some material objection occurs to this course, beyond what has been already stated, I shall venture to follow it, not meaning, that it shall be drawn into precedent.

Taking the bill then to be solely in the representative character, the defendant insists, that the plaintiff is bound to establish all the material facts, asserted in his bill, in order to found a decree. He must show, that there was a marriage, that the wife had authority to make the will, and that there has been a sufficient probate of the will to entitle the plaintiff to institute the suit. I agree, that all these facts are in some sort before the Court, and require proof. But my opinion also is, that they are sufficiently proved by the proper legal evidence. The Courts of Probate of *Rhode Island* have exclusive jurisdiction to grant administrations upon the estates of deceased persons within the state, and for this purpose to allow probates of the wills of persons dying testate abroad, as well as at home.² The jurisdiction applies as well to the wills of married women, as of those, who are sole. This point has been already disposed of in the case of *Picquet vs. Swan*, (4 *Mason*, 443, 461, 462.) If the jurisdiction attaches, all the incidents attach, and among others the incidental right of inquiry, whether the person was at the time competent to make the will. The decision of the Probate Court,

¹ See *Salvidge vs. Hyde*, 3 *Jac. & Walk.* 151.—*Edwards vs. Edwards*, 3 *Jac. & Walk.* 335.—*Mole vs. Smith*, 3 *Jac. & Walk.* 490.

² See *Rhode Island Statutes, Digest of 1822*, p. 211, 221.

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being a Court not only of competent but exclusive jurisdiction, establishing the will, and granting administration with the will annexed, is conclusive upon the very points now in controversy, and cannot be gainsaid. The proper remedy, if any, was by appeal.³ It is not for this Court to re-examine, whether the Probate Court had before it sufficient evidence to justify its decree. For us, it is sufficient, that such a decree was made, and that a valid administration now subsists under it. Even, if the decree were erroneous, as the probate of a will, it would still be good as a grant of administration; and such as would protect any payment made to the administrator.

No other objection has been made to the plaintiff's right of recovery. And my opinion, therefore, is, that he is entitled to a decree for the principal sum, admitted on all sides to be due, viz. \$5205,70. A claim has been made for interest in behalf of the plaintiff. But I can perceive no sufficient foundation for it. Mrs. *Cassels* died as long ago as 1804, and no administration was taken out on her estate until 1828. No interest is proved to have been made by Mr. *Brown*; and for twenty years Mr. *Cassels* seems to have left Mr. *Brown* without any knowledge of his residence, and without any instructions what to do with the dividends of principal and interest as they were made on the stock, from 1801 to the time of the final redemption in 1819. Under such circumstances of neglect on the part of Mr. *Cassels*, there is no reason to give interest, which must operate as a penalty.

³ See *Thompson vs. Tolmie*, 2 Peter's Sup. Ct. Rep. 157.

Nightingale vs. Sheldon.

ELIZABETH NIGHTINGALE

vs.

EDWARD S. SHELDON AND OTHERS.

The testator devised all his estate to his wife for life; if she died before his son *J.* arrived of age, then to his daughter *A.* until *J.* came of age; at that time the estate to be divided among his three children equally in fee, or to the survivors of them, if either should die leaving no issue. If all his children should die and leave no issue, and his wife should survive them, then to her in fee. *Held*, that the devise might be construed, (subject to the wife's life estate,) either as a devise to all the children in fee absolutely, on *J.*'s arrival of age, even though the wife was then living, and if they all died before that period without issue then to his wife in fee; or as a devise of the estate to the children in fee determinable on their dying in her lifetime without leaving issue, and in that event an executory devise over to her fee. But if neither construction could be adopted, then, as all the children died in the wife's lifetime, but two of them left issue who survived her, the estate in the event must be considered as intestate estate undisposed of by the will, inasmuch as the devise over to the wife could not take effect.

EJECTMENT for certain land in *Providence, R. I.* The cause was submitted to the Court upon a statement of facts, agreed by the parties, in substance as follows.

Edward Spaulding, in July, 1785, made his will, and after providing for the payment of his just debts and funeral expenses, devised as follows. "The residue, &c., the real as well as personal interest, I give and bequeath unto my beloved wife, *Audery Spaulding*, for and during her natural life, to be improved for her benefit, and providing for my children, relying on her goodness and discretion in that particular, as she may think proper. In case my said wife *A. S.* should not live to see my youngest son, *John Spaulding*, arrive to the age of 21 years, in that case I give and bequeath the all and full of every part and parcel of such of my estate as may be left by my said wife unto my daughter, *Amey Sheldon*, to be by her improved, and as a home for my said son, *John Spaulding*, as an equivalent for my said son's bringing up, till he arrives to the age of 21 years; at which time my will is, that all my then estate, real as well as personal, shall be divided amongst my children, *Amey, Edward, and John*,

equally, share and share alike, to them and their heirs for ever, or to the surviving children, in case of death to either of them leaving no issue. Further, should it so happen, that all my said children should die and leave no issue, and my wife survive them, then and in that particular my will and desire is, that the estate aforesaid be and remain hers in fee simple to dispose of at her will and pleasure."

The three children survived the testator. *John* arrived at 21 years of age, and died afterwards intestate and without issue in 1822, before the death of the wife of the testator. His daughter *Amey* and her brother *Edward* died leaving issue, after *John* arrived at 21 years of age, and before his death.

Upon this state of facts, the principal question argued at the bar was, what estate *John* took under the will of his father, and at what time that estate was to vest. The plaintiff contended, that he took an estate in fee simple in remainder after the death of the wife of the testator, which vested in him, either at the death of the testator, or at farthest on his arrival at 21 years of age; and that the devise over had, in the event, wholly failed. The defendants contended, that the estate was not to vest until the death of the wife of the testator, and then was to vest in such of the children or their issue as should survive the wife; and that *John* having died in the lifetime of the wife without issue, he took nothing, and the whole vested in the issue of his brother and sister, who survived the wife.

Pratt and *Thomas Burgess* for the defendant.

The construction to be given to a will depends upon, and is governed by, the obvious intention of the testator, and this intention must be collected from the whole will taken together, *ex visceribus testamenti*. (4 *Cruise*, 172, 173, 174.) And we contend, that, from the obvious intention of the testator, *Edward Spaulding*, collected from the whole of his will, the following points may be deduced, and are fully established.

1. That the will gives the estate in controversy to *Audery Spaulding*, wife of the testator, absolutely during the term of her natural life, for her use and for the benefit of the testator's family.

2. That if the said *Audery Spaulding* should die before *John T. Spaulding* arrived at the age of 21 years, then *Amy Sheldon*, daughter of the testator, was to take the same estate for the same purposes for which the widow, *Audery Spaulding*, held it, *to wit*, for the bringing up of *John* until he arrived to the age of 21 years, and in this event, *to wit*, the death of the widow before *John* arrived to the age of 21 years, the estate was to be divided at the time that *John* attained the age of 21 years. But this event, *to wit*, the death of the widow during the minority, or even the life of *John*, never happened.

3. That while the widow lived no division was to take place on *John's* arriving to the age of 21 years, nor was the fee in remainder in the estate to vest absolutely, at that particular time, in any persons in being, but the estate was to remain entire in the improvement of the widow until her death, and that the persons, in whom the fee in remainder should absolutely vest, were to depend on who of the children or their issues should be alive at the decease of the widow ; and

4. That if none of the children of the testator or their issue survived the widow, then she was to take the remainder in the estate in fee simple absolute, but that if any of the children or their issue did survive the widow, then they were to take the remainder in fee simple absolute, and that the person or persons capable of taking the remainder in fee simple absolute could not be determined until the decease of the widow, or until she survived all the children and their issue. These points, we say, are fully substantiated by the manifest intention of the testator collected from the will. And it appears by the agreed statement of facts in this case, that the widow, *Audery Spaulding*, survived all the children of the testator, and *John* died leaving no issue,

and that, at the widow's death, the defendants and the issue of *Edward Spaulding*, son of the testor, under whom the defendants claim part of the estate by purchase, were the only surviving issue of the children of the testator, and consequently, at that time, *to wit*, at the death of the widow, the remainder in fee in the estate in controversy, vested in them entire, as an absolute estate in fee simple.

Let us suppose, that *John*, under the will, as the plaintiff's counsel suggests, took a fee simple, subject to be defeated upon the happening of a future contingency. From the whole language in the will, what was this contingency which was to defeat his estate? It clearly was not, as the plaintiff's counsel supposes, the happening of the death of *John* before he arrived at the age of 21 years, for it is very apparent from the whole will, that the testator did not contemplate any alteration in the character of the estate so long as the widow and any of the children and their issue were living, and that *John* was not entitled even to a division of the estate when he arrived at the age of 21 years, unless the widow had died previous, but the widow being alive at the time *John* arrived to the age of 21 years, there was no more alteration in the character of the estate, at that time, under the will, than there was at any other period of *John's* life before or after that time. But the manifest contingency in this will, which was to defeat the estate of *John*, was the happening of his death in the lifetime of the widow, which contingency did happen, and thereby defeated the estate of *John*.

The sound and well settled rule of law relative to the construction of wills, is, in the first place, to endeavour by a minute examination of all the provisions of the will, to ascertain, if possible, the true intention of the testator, that the same may be carried into effect; and, in the language of Mr. *Cruise*, "the intention of the testator must be collected from the whole will, so as to leave the mind quite satisfied about what the testator meant." It is true, however, that the construction, if consistent

with the other parts of the will, ought, in the language of the same author, to be such, that the intent of the testator may be rendered consistent with the rules of law ; but the same author further adds, " that the technical words are presumed to be used in the sense which the law has appropriated to them, unless the contrary appears ; but when the intention of the testator is plain, it will be allowed to control the legal operation of the words, however technical." (4 *Cruise*, 171, 172.)

The plaintiff's counsel suggests, that all the devises over after the life estate of the widow are void, being limited upon contingencies, which not having happened, the devises over failed, and the remainder vested in the heirs at law by descent, by which it is presumed we are to understand, that the remainder over to the children, *Amy*, *Edward*, and *John*, was not to take effect, except upon the happening of this contingency, *to wit*, the death of *Audery Spaulding*, the widow, before *John* arrived to the age of 21 years, and the argument of the plaintiff's counsel, if rightly understood, is, that the testator did not intend, and in fact did not by his will give, the remainder in his estate to his three children, *Amy*, *Edward*, and *John*, and to the survivors of them in case of death of either of them, leaving no issue, unless the widow should die before *John* arrived to the age of 21 years.

In answer to this we contend, that the testator did not intend, that the remainder over to his children should depend upon a contingency which must have appeared altogether unimportant in his mind, *to wit*, the death of the widow before *John* arrived to the age of 21 years, but that the fair and obvious intention of the testator was to give the remainder over, at all events, to such of his children and their issue as should survive the widow, let her death happen when it might, but that in case she should die before *John* arrived to the age of 21 years, then in that case the estate was to be improved by *Amy Sheldon* for the bringing up of *John* until he arrived to the age of 21 years, and then to be divided among such of the children as survived the widow,

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and the issue of such of them as might be dead, share and share alike. And it is not only very natural, but also very evident from the will, that the testator had in view two several periods of time when he might wish to have the remainder in his estate divided among his children and their issue, the one was on the arrival of *John* at the age of 21 years, in case the widow should at that time be dead, the other was on the death of the widow at any time after *John's* arrival at the age of 21 years; and the testator clearly states the manner in which his estate was to be divided, in case the widow died before *John* arrived to the age of 21 years, for he says it "shall be divided amongst my children, *Amy*, *Edward*, and *John* equally, share and share alike, to them and to their heirs for ever, or to the surviving children, in case of death to either of them leaving no issue;" and in the same breath he further says, that, "should it so happen, that all my said children should die and leave no issue and my wife survive them, then in that particular my will and desire is, that the estate aforesaid be and remain hers in fee simple to dispose of at her will and pleasure," by which it is clearly to be inferred, that the testator intended, that, in case the widow did not survive all the children and their issue, at her death the estate should be divided in the same manner as he had directed in case a division should take place on *John's* arrival at the age of 21 years, and that the time when the remainder was absolutely to vest, so far as it related to the persons who were to take it, was altogether unimportant in the mind of the testator, and he having declared, in one instance, the persons who should take the remainder, to wit, his three children, or the surviving children, in case of the death of either of them leaving no issue, and then immediately proceeding to say, that, in case his wife should survive all his children and their issue, then the remainder should vest in her; the converse of the proposition is, and the clear intention of the testator was, that, in case his wife did not survive all his children and their issue, that the remainder should absolutely vest in and

be divided among his surviving children (to wit, the children that should survive his wife, and the issue of such of them as might be dead), share and share alike; the word surviving, as used in the will, is a relative term, and clearly has reference to those children who might survive the widow. The view which we have now taken in relation to the remainder over, is supported by analogy, in reference to other expressions and contingencies in the will; for let us suppose, that the widow had died before *John* arrived to the age of 21 years, and that *Edward*, one of the children, had also died before that time, leaving issue, and when *John* arrived to the age of 21 years, the estate must be divided. And now by the will among whom is it to be divided? We think it would not even be contended by the counsel for the plaintiff, but that, in a case like this, the estate would have been divided between *John* and *Amey*, and the issue of *Edward*, who was dead, and yet it will appear, by comparing the expressions in the will, that the testator, in the supposed case, did not give a share of the remainder to the issue of *Edward*, in case of a division when *John* arrived to the age of 21 years, with any more perspicuity than he gave the remainder to his children who should survive his wife, and to the issue of such as should be dead, in case she died after *John* arrived to the age of 21 years. For in the supposed case the testator orders his estate to be divided amongst his three children, *Amey*, *Edward*, and *John*, or the surviving children, in case of the death of either of them, leaving no issue; by which expression it is also apparent, that the testator intended, in case of a division, that the remainder should be divided among such of his children as survived the widow and the issue of such as were dead, share and share alike. But according to the construction contended for by the counsel for the plaintiff, it might with equal propriety be said, in the supposed case, that the contingency had never happened, to wit, the death of either of the children, leaving no issue; for although *Edward* is supposed to be dead, yet he has left issue, and there-

fore that the remainder over would be void, being limited upon a contingency which had never happened, and consequently, in the supposed case, neither the issue of *Edward* nor the surviving children could have taken any estate by the will. But such a construction, we think, would be doing violence to the manifest intention of the testator.

In conclusion we contend, that it was the manifest intention of the testator, as collected from all the several provisions of his will, not to die intestate as to the remainder of his estate, but that his wife should have the improvement of his estate so long as she lived, and that the fee in remainder did not vest absolutely, but only conditionally, if at all, in any persons, so long as both the widow and any of the children of the testator or their issue were living, and that at the widow's death, the fee in remainder should vest absolutely in such of the children as survived her, and the issue of those that might be dead, share and share alike, but in case it should happen that the widow should survive all the children and their issue, that at the death of the longest liver of them, the remainder over should vest absolutely in her ; but that so long as both the widow and any of the children of the testator or their issue were living, the remainder in fee could not vest absolutely, but, if at all, only conditionally, in any persons, and that during such time the person or persons in whom the remainder in fee would ultimately and absolutely vest, could not be known ; and that the widow having survived all the children of the testator, and the defendants, and the children of *Edward Spaulding*, the son, under whom the defendants claim title to a part of the estate in controversy, by purchase, since the death of the widow, being the only issue alive at the death of the widow, the fee in remainder at her death vested absolutely in them, and now belongs to the defendants in fee simple.

Tillinghast and *Searle* for the plaintiff. That the intention of the testator is to be regarded in the construction of his will, no doubt can be entertained, and that every part of the will may

be examined and recurred to, to ascertain it, is equally true. But that intention is not to be sought in vague conjectures, but from the application of the sober and settled rules of the common law.

By the will it is perfectly clear that *Audery*, the testator's widow, took nothing but a life estate. For as the contingency upon which the fee was devised to her, *viz.* her surviving all her children and their lawful issue, never happened, no estate beyond her life estate, was ever intended to vest or ever did vest in her.

The widow having survived the minority of her son *John*, who also lived to be over twenty-one years of age, the special devise to the daughter, in the event of the mother's death during that minority, is out of the case, except as it may aid us in the construction of the will, as to the disposition of the fee.

It also very clear that the testator did not intend that his estate should pass into the actual possession of his children during the life of his widow. But this consideration can give us no aid in deciding the title to the fee. For although the right of possession may be in one person, yet the fee may be in another; the question of right of possession and right of property may be totally distinct and independant, arising from the same or a different grant, according to the circumstances of each particular case. The devise of a life estate to the mother, therefore, affords no rule by which the title to the fee simple is to be ascertained.

And although it would not be determined until the close of the widow's life, in whom the fee would ultimately and absolutely vest, yet that affords no objection to an argument against the fee having previously vested in some person liable to be divested by the occurrence of some subsequent event. A fee may be limited upon a fee, and be good as an executory devise. In the case in question, therefore, the fee of the testator's estate may have vested, and, as we contend, did vest, in his children, subject to be defeated by matter subsequent, which, however, never happened, and therefore left an absolute fee simple in those children and their lawful heirs and assigns.

The fee of this estate vested, by virtue of the will, in the children of the testator, immediately upon his death, or at farthest immediately upon *John's* arriving at the period of his majority.

It is manifest beyond all doubt, that the testator intended to dispose of all his estate, and it is equally manifest that he intended his children should take it equally.

By the will the testator devised all his estate to his wife during her life, and if she should die during *John's* minority, he devises the property to his daughter *Amey*, to enable her to educate *John* until he arrived at the age of twenty-one years. *At which time* (*John's* majority) his will is, that all his estate not then expended in the support &c. of the family, shall be divided amongst his three children, their heirs, &c. equally, or the survivors, if any be dead without issue.

The remotest period after the testator's death, at which the fee was to vest in his devisees, was *John's* arrival at full age. The expression in the will, *at which time*, is not confined to the sentence, or either branch of the sentence, next preceding it, but extends to, and rides over, the whole clause, and definitely fixes the period of vesting. And this is consistent, also, with the life estate of the widow. The fee could vest in the children, subject to her life estate, and the word *divided* is satisfied with this construction.

It is contended, on the other side, however, that *John's* title depended on his surviving his mother, and as he died first, he never had any interest in the estate.

How that position can be maintained is not easy to be conceived. By the will it is demonstrable, that she took nothing which was given to *John*, from the mere fact of her having survived him. The devise over to her was upon the sole condition, that she survived all the *testator's* children, and *all their lawful issues*. If all the testator's children and all their children *except one* had died, living the mother, she would have taken *nothing*. The devise is not to be taken distributively; she does not take

the share of one dying without issue in her life time, but all must die, and the issue of all must die, before the devise over to her takes effect. The whole family of children and grand-children must be extinct, before the title of the survivors is extinct. The widow, not having survived the whole family, took no fee in the estate, and whatever estate *John* took prior to his death, was not lost or impaired by his mother's surviving him.

It is further contended on the other side, that by the will the estate is devised to the testator's children, and their issue, who survived the mother. But there is not a single expression in the will indicating such an intention, nor a single rule of law which supports such an interpretation. The devise to the widow is on condition that she survives all her children and their issue. And the legal inference, say the defendant's counsel, is, that all the estate is devised to her survivors; a deduction both illegal and illogical, and, as we contend, refuted by the whole tenor of the will, and every rule of construction known to the law. It by no means follows, that because the fee was given to the widow upon a contingency that never happened, any of the children therefore are to be disinherited. The fee of the estate in remainder was undoubtedly in all the children during the mother's life. Has it been divested? Has the testator declared, that if *John* died, living the mother, his share should go to the surviving brother and sister? Is not his intention most manifest, that his children should have his estate equally, after *John's* attaining his majority? Is there an intimation that that intention is changed, or that the title should be changed, except in one event only, viz. the mother's surviving all her children and their issue? Why should *John* be disinherited after he reached the years of manhood? The estate is not devised in tail to the grand-children of the testator, but in fee to his children. *Edward* and *Amey*, who had children, took a fee, and could dispose of that fee. Why should not *John*, after his majority? There might be some reason for limiting his title to his arrival at full age, but then

the reason ceases, and all subsequent limitations are odious to the law, and are not to be sustained by loose conjectures of the testator's intentions. Suppose the testator had by his will merely devised a life estate to his wife, and provided that if she survived all her children and their issue, she should take the estate in fee, and said nothing more ; can it be pretended that the surviving children only would have taken ? Would not the fee have vested equally in all the children, immediately on the testator's death, to be divested from all or any of them, by the mother's surviving them all and their issue ? Would not the law pronounce, that all the children took and had a right to hold against all the world, until their mother succeeded at once to all their rights by virtue of the will ? And yet the supposed case is far less cogent in favor of the children, than the case in question ; for in that case, the intention that the children should take it is by inference only, and in this case the intention of the testator is manifest, that his then children should take in fee the remainder of his estate equally.

The argument of the defendant's counsel supposes, that if *Edward* had died, leaving issue, that his issue would have taken under this devise to the children, though not expressly named. And hence he infers, that the estate goes to the children and their issue, who survived the mother.

That *Edward's* issue would have taken, let him die when he would, is to us indubitable. The devise to *Edward*, *Amey*, and *John*, of the testator's estate, is to them, their heirs and assigns for ever, and no doubt vested a remainder in fee in them, subject to the sole contingencies of an entire failure of all the children and their issue, prior to the death of the mother, and to *Edward's* dying without issue during the minority of *John*. Subject to these events, *Edward* could dispose of his share of the estate by deed or will, and his children would inherit it, on his death. And the subsequent part of the same devise, in which he gives the share of the child dying without issue, confirms this construction. That clause in the devise, while it shows that the issue of *Edward* would take,

does not enlarge, but restrains the devise from an absolute vested remainder, subject only to the mother's survivorship, to a further contingency, of his dying without issue, prior to *John's* majority. If, therefore, *Edward* had died before or after *John's* majority, and had left issue, he would have died seised of a vested remainder, defeasible only by the mother's surviving all her children and their issue; and *Edward's* issue would have taken their father's share, as his heirs, unless he had otherwise disposed of it, and would have holden it, subject only to their grandmother's surviving them, their uncle, aunt, and their issue. But in the contingent devise of the fee to the widow, we look in vain for a provision of this kind, or for any language which will sustain the construction of the defendant's counsel. By that devise, it is simply provided, that the mother shall take the fee if she survives all her children and their issue, but it does not provide that the children *who survive her alone*, and the issue of those deceased, shall take. And no such provision was necessary, the remainder in fee having been previously disposed of. And yet if such had been the testator's intention, we should have found some expression indicative of that intention.

If we are correct in our exposition of this will, *John* had a legal interest in the mortgaged premises, and the plaintiff's title is valid.

If we are incorrect in our exposition, then we hold it to be perfectly clear, that nothing beyond a life estate to the widow was legally devised. The contingent devise of the fee to her never took effect, and it has, we contend, been fully shown, that there is no devise to the survivors of the widow, as insisted on by the other side. Unless, therefore, the children of the testator took a vested remainder, as before stated, there is no disposition of the fee, and as to that fee the deviser died intestate. In that case it is perfectly clear, that the estate descended equally to his three children, and that *John* took one third, which is covered by the mortgage.

Upon the whole it is submitted, that *John*, at the time of the mortgage, had a vested legal interest in the mortgaged premises, which was not divested by any subsequent event, and that the plaintiff is entitled to the judgment of the Court, for possession of the same.

STORY J. In the construction of wills the cardinal rule is, to follow the intention of the testator, as it is to be collected from the whole provisions of the particular will. If the testator uses words, which have received a technical sense, that sense is presumed to be his own, unless a different meaning is fairly deducible from the context. In that event, the technical sense will bend to the apparent intention. If there are two intentions on the face of the will, one of which is general and consistent with the rules of law; and another special and inconsistent with the rules of law, the latter yields to the former, and if necessary to give effect to the will, may be rejected altogether. The struggle in all such cases is to accomplish the real objects of the testator, so far as they can be accomplished, consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will.

The interpretation of the present will is certainly not unattended with difficulty; though I confess, that until I had examined the ingenious arguments urged at the bar, I had not supposed, that there was so much matter for controversy.

The testator manifestly intended to dispose of his whole estate, real and personal. After providing for the payment of his debts and funeral charges, he bequeathes the residue to his wife, during her life, "to be improved for her benefit, and providing for his children, relying," as he says, "on her goodness and discretion in that particular, as she may think proper." In case his wife should not live to see his youngest son, *John Spaulding*, arrive to the age of 21 years, he bequeathed the same estate to his daughter *Amey*, to be by her improved and as a home for his son

John, as an equivalent for his said son's bringing up, till he arrives to the age of 21 years. Then follows this clause. "*At which time my will is, that all my then estate, real as well as personal, shall be divided amongst all my children, Amey, Edward, and John, equally, share and share alike, to them and their heirs for ever, or to the surviving children, in case of death to either of them, leaving no issue.*" Now it is clear, that the estate to his daughter, *Amey*, was to take effect only upon the contingency, that his wife died during *John's* minority. And the question first meeting us in the cause is, whether the remainder of the clause is dependent upon that event, or whether it applies to the whole of the preceding provisions of the will, and rides over all of them. In other words, is the estate to be divided when *John* arrives of age, although the wife is then living; or is it to be divided only in case of her death before that period? The former is the construction contended for by the plaintiff; the latter is contended for by the defendants.

If the defendant's construction is adopted, then if the will had stopped here, there would plainly be no devise whatsoever of the remainder after the wife's death, in the events which have happened. We shall presently see, whether the devise over to her helps the defect. But supposing this to be the only clause, which contains any devise to the children, the latter will take nothing under the will, unless this clause is construed to apply to a division of the whole estate (subject to the wife's life estate) on *John's* arriving at 21 years of age. One doubt arising upon this construction is, that the clause applies as well to personal as real estate; and it may be asked, how could the personal estate be divided during the wife's life, without interfering with her right of enjoyment? Perhaps this objection is not in its own nature insuperable. Testators do not ordinarily distinguish between personal and real estate, and generally suppose them susceptible of the same modifications as to enjoyment and right. It is farther objected, that the clause is found in immediate connexion with

a provision for the daughter, *Amey*, during *John's* minority, and naturally flows from that. But that again is not decisive ; for the testator may still have contemplated the same event (i. e. *John's* arrival at age) as the period, at which his devises to his children should vest absolutely in them. It is asked, on the other side, and with great force, why the testator should not be presumed to intend a present vested interest in remainder in his children when they were all of age and capable of making a suitable division for their benefit, rather than to postpone all their interest upon the contingency of their surviving his wife, and by such postponement lead to a preference of unborn issues over his own children ? There is much weight in this suggestion. And it acquires additional force, if upon any other construction, the children are, by the terms of the will, left unprovided for, in case the wife should survive *John's* coming of age. It would be strange, that the testator should so solicitously provide for a division of his estate among his children, if his wife died during *John's* minority, and yet should leave them unprovided for, if she survived that period, notwithstanding her estate was limited to her own life. To argue such an intention, would be to suppose great want of forethought, or great capriciousness of purpose in the testator.

Let us see, then, whether the subsequent words of the will afford any light to aid us in the proper construction. They are as follows. "Further, should it so happen that *all* my said children should die, and *leave no issue*, and my wife survive them, then and in that particular my will and desire is, that the estate aforesaid be and remain hers in fee simple, to dispose of at her will and pleasure." The event never happened. She did survive all the children ; but she did not survive their issue. So that the devise over never took effect to enlarge her life estate into a fee. Either, therefore, the remainder is intestate property, divisible among the heirs, and of course *John* took one third ; or the will has operated as an effectual devise of it to the children or their issue.

Now this clause does not purport on its face to make any devise whatsoever to the children. It is simply limited to a devise over to the wife, on their dying without leaving issue, in her lifetime. It presupposes that the children had taken the estate by some antecedent provision. If we suppose, that the prior clause, for the division of the estate on *John's* arriving at 21, was intended to apply generally, there would be no difficulty in reconciling this devise over with such an intention in either of two ways. In the first place, the devise over might be construed to be limited to the case of all the children dying without leaving issue, *before John's arrival at age*, in which case if any of the children or their issue should survive *John's* arrival at age, they would take an absolute fee. Or, in the second place, it might be construed to extend to the case of all the children dying without issue, at any time during the life of the wife, and then it would be an executory devise over, after a conditional fee in the children, determinable on that event; and in this view, it would have become absolute by the non-occurrence of the fact, which was to determine it. The clause itself is susceptible of either construction; and so construed, there is no interference with any express intention of the testator.

But the defendants contend, (and it is vital to their success in the cause, that they should contend,) that the will completely disposed of the whole estate, and that it contains a devise to such of the children only, or their issue, as should survive the wife, in fee, and that such survivorship is indispensable to their title, and forms the contingency, on which it is to vest. Now, how is this construction made out? There is no clause in the will, expressly making such a provision. The whole argument of the defendant's counsel rests on the ground, that the clause respecting the division of the estate is inapplicable to it. It must then be deduced, if at all, by implication from the terms of the devise over to the wife, in the event of her surviving the children and their issue. But the terms of that devise are just as well satisfied

by supposing the testator to have given all his children a vested fee, determinable upon her surviving them and their issue, as by supposing a contingent fee to them, to vest upon the happening of the same event. If, therefore, the case stands equal, how can the Court raise any such estate by implication, unless upon the most arbitrary conjecture? But does it stand equal? In the first place, the law generally leans against creating contingent estates, when the words of the will may be satisfied by considering them vested. In the next place, in order to arrive at this conclusion, we must suppose an intention in the testator to deprive his immediate offspring of all present fixed interest in his estate, (however important such an interest might be to their comfort,) when it is plain from other parts of his will, that they were all objects of his affection and bounty. We must suppose, that he deliberately intended to give them a mere contingent interest, and for this purpose to postpone them, as the event might be, and indeed was, in favor of unborn issue, towards whom he could not be presumed to feel any peculiar affection. Such an intention is neither natural nor wise; and a court must go very far in making presumptions, to justify itself in deducing it from such general words. I confess myself not bold enough to undertake it. The prior devise of a life estate to the wife, certainly affords no argument to support it; for that merely points to the order, in which the property is to be enjoyed in possession, and not to the period when it shall vest in right. Let us suppose for a moment the intermediate devise (as to the division of the estate on *John's* arrival at 21,) struck out of the will, as a view most favorable to the defendants; how then would the case stand? There would be a devise to the wife for life, and a devise over to her in fee, in case she should survive all the children and their issue. That is the very form, which the words of the will must assume, as the defendant's argument connects them. Now, we see at once, that is no devise whatsoever in terms to the children. And yet, no one can read the words without feeling, that they are

the primary objects of his bounty, after the wife's life estate is spent. If after the devise to his wife for life, the testator had added the words, "and after her death the remainder to my three children and their heirs," and then the devise over had followed, could there be a legal doubt, that the Court, upon acknowledged and settled principles, must have construed the remainder immediately to have vested in the children upon the testator's death, subject to be defeated by the executory devise over taking effect? I presume not. If the Court were driven to give a construction to the will upon the two clauses above-mentioned, drawn into such connexion, and to create an estate by implication in the children, I confess I know not what words, more appropriate, or more exact to express such implication, could be used. But it would be sufficient for the present case to say, that the construction, which the defendants wish the Court to give to the words of the will, is not in its own nature more probable, or more consistent with any ascertained intention of the testator, than that before suggested.

If it were necessary to decide the case upon the very form of the provisions in the will, my present judgment is, that one of two constructions ought to be adopted. 1st. That the clause as to the division of the estate, on *John's* arrival at 21, should be construed to apply as well to the case of the wife being then alive, as of her being then dead; and in this view the devise over ought to be restrained to all the children's dying during *John's* minority, without leaving issue. Or, 2dly, putting that clause aside, that the children should be deemed to take a vested estate in fee in remainder after the wife's life estate, with an executory devise over to the wife, if she survived them and their issue. Upon either construction the plaintiff would be entitled to recover.

But if these constructions are to be rejected, as not fully supported by any reasonable implication upon the terms of the will, I am most clearly of opinion, that the construction set up by the defendants is indefensible in point of law, and rests upon a

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far more unsatisfactory and infirm foundation. The consequence, then, must be, from the very doubt of the testator's intention, and from the omission to provide for the case, which has happened, that the estate must be deemed intestate ; and then the plaintiff is entitled to recover the one third, which was *John's* distributable share.

In either view my opinion is, that upon the facts agreed, judgment ought to be entered for the plaintiff.

The District Judge concurs in this opinion, and therefore judgment must be entered for the plaintiff for one third of the demanded premises.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1829, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

UNITED STATES *vs.* EDMUND DAVIS.

The offence of larceny is not punishable under the act of 1790, ch. 9, [36,] unless committed in a place under the sole and exclusive jurisdiction of the *United States*; and to bring the case within the statute there must be an averment of such sole and exclusive jurisdiction in the indictment.

"Personal goods," in that statute, do not include choses in action, the latter not being the subject of larceny at the common law.

Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the *United States*, it may yet be punishable under the third section of the act of 1825, ch. 276.

Offences are punishable under that section according to the state laws, where they are committed, under circumstances, or in places, in which, before that act, no Court of the *United States* had authority to punish them.

It seems that a reservation on a cession of "concurrent jurisdiction," to serve state process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the *United States* over the ceded place. It merely operates as a condition of the grant.

INDICTMENT against the defendant for larceny. The indictment charged, that the defendant, on the 15th of May, 1829, in the *Marine Hospital* at *Chelsea*, in the District of *Massachusetts*, a needful building belonging to the *United States*, the site whereof has been and is ceded by the State of *Massachusetts* to the *United States*, with force and arms, one trunk of the value, &c. one

bank bill of the *North Bank*, of the value, &c., one bank bill of the *Bank of the United States*, of the value, &c. [describing also sundry other articles, and gold and silver coins,] and one promissory note, being then unsatisfied &c. of the goods, chattels, monies, and property of *Charles Turner*, steward and overseer of the said *Marine Hospital*, then and there in the said *Marine Hospital*, being found, *did then and there feloniously steal, take, and carry away*, against the peace and dignity of the said *United States*, and contrary to the form of the statute of the *United States* in such case made and provided. Plea, not guilty.

Upon the trial the jury disagreed as to the facts, and were, by consent of the parties discharged from giving any verdict. And thereupon *F. Dexter*, for the defendant, moved the Court to quash the indictment upon an objection, which he had taken at the trial. It was as follows. The present indictment is founded on the act of 1825, ch. 276, § 3. That section applies only to offences, which have not been previously provided for by the crimes act of 1790, ch. 9, [36,] 16. The offence described in that section is larceny; and so is that in the present indictment. The offence too is committed in a place within the exclusive jurisdiction of the *United States*. And if not so, still as the specific offence is provided for, although not when committed in such a place as the *Marine Hospital* under the cession, it is out of the purview of the act of 1825. The words of that act (§ 3) are "that if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the *United States*, such offence shall receive the punishment provided by the laws of the state in which the ceded territory is situate. The terms of the statute do not apply to the place, but to the description of the offence. If not punishable when committed in the particular place, still, if the offence is provided for, and punishable when committed in any other place, the statute does not authorize the Court to entertain jurisdiction.

Dunlap (District Attorney) for the *United States*.

The motion to quash the indictment rests upon two grounds ; first, that the indictment is not supported by the statute of 1825, ch. 276, § 4 ; secondly, that it is not supported by the statute of 1790, ch. 36. § 16. It is said, that it is not within the statute of 1825, because the offence is “ specially provided for ” by the statute of 1790 ; and not within the statute of 1790, because the indictment does not aver, that the place where the larceny was committed was within the “ *sole and exclusive* ” jurisdiction of the *United States*. The answers offered to these objections to the indictment are these. The offence, charged in the indictment,—stealing a trunk, containing money, bank bills, and a promissory note,—was not provided for by the statute of 1790, for the *Marine Hospital* at *Chelsea* was not a place within the “ sole and exclusive jurisdiction ” of the *United States*, within the words and meaning of that statute. It was a place where Congress must necessarily, by the constitution of the *United States*, art. 1, § 8, exercise “ exclusive legislation ; ” but the act of cession, by the state of *Massachusetts*, expressly provides, that the state of *Massachusetts* shall retain “ concurrent jurisdiction,” so far as that all criminal and civil processes of the state may be executed within the ceded tract of land, and persons residing there are to be considered inhabitants of the town of *Chelsea*.

If the cession of the tract to the *United States* necessarily vested the “ sole and exclusive jurisdiction ” in the *United States*, upon the ground, that “ jurisdiction ” must be “ sole and exclusive,” then alleging the place, as is alleged in the indictment, to be “ under the jurisdiction of the *United States*,” is alleging it to be under the “ sole and exclusive jurisdiction ; ” and, consequently, the indictment, if not supported by the statute of 1825, is, clearly, by that of 1790. It was the opinion of the Supreme Judicial Court of *Massachusetts*, delivered by Chief Justice *Parsons*, in relation to offences in the *Springfield Armory*, in *Clary’s* case, (8 *Mass. Rep.* 72,) that the cession by the state of *Massachu-*

setts vested in the *United States* the sole and exclusive jurisdiction in relation to offences there committed. The word "jurisdiction," in the first section of the statute of 1825, being in relation to the forts, dock-yards, arsenals, and magazines, in the statute of 1790, is evidently there used in the sense of "sole and exclusive jurisdiction."

On the other hand, if the mere possession of "jurisdiction" is not the possession of "sole and exclusive jurisdiction," then the *Marine Hospital* at *Chelsea* is not under the "sole and exclusive jurisdiction" of the *United States*, because of the "concurrent jurisdiction" of *Massachusetts*, reserved in the cession; and, therefore, it is not a place described in the statute of 1790, and the case falls within the statute of 1825.

The sixteenth section of the statute of 1790 contains the word, "places," but it evidently refers to the third section of that law, in which is contained the following enumeration; "fort, arsenal, dock-yard, magazine, or in any other *place* or *district of country* under the sole and exclusive jurisdiction of the *United States*." It is contended, that the word "*place*," is here used as synonymous with "*district of country*," and was never intended to apply to a "needful building," like the hospital, as such buildings were not then possessed. This, probably was one of the reasons which induced Congress to make the very provision in the statute of 1825.

The statute of 1790 did not provide for this case, for it prohibited, if it prohibited a technical larceny, (which, from the language used, is doubtful,) the stealing of "personal goods" merely. Mr. *Dane*, in his Abridgment of American Law, vol. 7, p. 176, observes, upon this law, that the act does not say, "*feloniously stole*." In the present case, the only "personal goods" stolen were the trunk. Its contents were monies, bank bills, and a promissory note. Perhaps the monies may be included under the term, "personal goods," but the bank bills and the promissory note, being choses in action, cannot; and, as the larceny

was committed at one time and place, it could not be split into two offences. Consequently, the case was not provided for in the statute of 1790, and fell within that of 1825. Goods and chattels are synonymous words. The law dictionaries refer, for a definition of goods, to the word, chattels. *Jacob's Law Dictionary, Goods.*

In *Comyn's Digest*, title *Biens*, is an enumeration of what are included in the term, goods ; neither money nor choses in action are enumerated. Lord *Coke*, also, makes a similar enumeration ; but although he mentions such things as " bows," does not enumerate money nor choses in action. *Coke Littleton*, 118. *Jacob's Law Dictionary*, word *chattels*, contains a similar definition. Money and choses in action, so far from being mentioned as chattels, are expressly stated not to be so. Had choses in action been " personal goods," there would have been no necessity for the various statutes passed to render property of this nature the subject of larceny ; for there never was a time in the history of the common law when a felonious taking and carrying away the " personal goods " of another, with intent to steal, was not larceny. These statutes were passed expressly upon the ground, that choses in action were not " personal goods." The words, " personal goods," in the 16th section of the statute of 1790, are evidently used in a *common law sense*, instead of the word, *chattels*, and being in a *penal* statute, are to receive a *strict* construction. Because money and choses in action are *assets*, it does not follow that they, particularly choses in action, are " personal goods ;" for mortgages, leases for years, stocks, &c. are assets in the hands of executors and administrators, though certainly not goods and chattels.

STORY J. delivered the opinion of the Court, as follows. We have considered the motion, and are of opinion, that the objection taken at the bar cannot be maintained in point of law, and the motion ought therefore to be overruled. The Crimes Act of

1790, ch. 36, [9,] § 16, provides, "that if any person *within any of the places under the sole and exclusive jurisdiction of the United States*, or upon the high seas, shall take and carry away, *with intent to steal or purloin*, the *personal goods* of another," &c. he shall, on conviction, be liable to a certain punishment prescribed by the act. It is clear, that no person is punishable under this act, unless his case falls within the descriptive terms used in the act. If he should take and carry away, with intent to steal or purloin, any thing, not the "*personal goods*" of another, or should commit the offence in a place not "*under the sole and exclusive jurisdiction of the United States*," he would not be liable to punishment under the act. And an indictment, which did not contain all the material statements to bring the case within the statute, would be bad, and judgment might, even after verdict, be arrested for the defect. And an indictment, to be properly framed, must follow, if not the very words, at least the substance of the statute. Now, it is clear, that the present indictment could not be supported for a moment on the act of 1790, for it does not state, that the place is "*under the sole and exclusive jurisdiction of the United States*," nor does it use the words of the statute, "*take and carry away with intent to steal or purloin*;" both which defects would be fatal. For in criminal cases, courts of law are not at liberty to make intendments and inferences to support indictments, in the same manner as they may do to support civil actions. How, then, can the Court say, upon this motion, that the offence described in this indictment is the same offence provided for in the act of 1790? If the words of the act of 1790 describe the offence of larceny or theft at the common law, still the indictment must use the words of the statute, for it is punishable as a statute offence; and it would not be sufficient to allege, that the party was guilty of larceny or theft. And for the same reason it would not be sufficient to use any other words, not being those of the statute, although in the sense of the common law they may be descriptive of the same.

offence. Whether the words, "take and carry away with intent to steal," are exactly in all cases of the same legal import with "feloniously steal, take, and carry away," it is unnecessary to consider.

Farther; an indictment on the act of 1790 lies only, where the offence is committed in respect to the "personal goods" of another. To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation. Now, in the strict sense of the common law, personal goods are goods, which are moveable, belonging to, or the property of, some person, and which have an intrinsic value. Bonds, bills, and notes, which are choses in action, are not esteemed, by the common law, goods, whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person, from whom they are stolen, but only evidence of property.¹ It is true, that the words, "goods" or "chattels," may, in the construction of wills, include bonds, notes, bank-bills, &c.; but this is upon the presumed intention of the testator, where a liberal exposition of his words is allowable, and upon principles derived from the civil and canon law.² But in penal statutes a more strict construction is adopted; and the analogy of the common law in respect to larceny may well furnish the proper rule for decision. We think, then, that "personal goods," in the sense of the act of 1790, do not embrace choses in action. And the present indictment is, in part, founded on a larceny of choses in action.

But the decisive objection against the motion is, that to bring the case within the act of 1790 the offence must be committed in a place within "the *sole and exclusive jurisdiction* of the *United States*." The allegation, in the present indictment, is,

¹ See 2 Bl. Com. 383, 387, 394, 396, 397.—4 Bl. Com. 232, 233, 234.—2 East, Pl. Cr. 587.—2 Russell, Crimes, 1095.—1 Hawk. P. Cr. B. 1. ch. 33, § 34, 35.

² 2 Roper on Legacies, ch. 16.

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that the site of the *Marine Hospital* "has been and is ceded by the State of *Massachusetts* to the *United States*;" which allegation is quite consistent with its not being a sole or exclusive jurisdiction. At least the Court cannot intend otherwise upon a motion of this nature. It cannot judicially say, that a cession of jurisdiction is, *ipso facto*, equivalent to, and necessarily a sole and exclusive jurisdiction. If we are at liberty to look into the statute of *Massachusetts* (stat. 1825, ch. 181, [4th of March, 1826,]) ceding jurisdiction of a place for a *Marine Hospital* in *Chelsea*, which, as a public statute, we may take notice of, (though we cannot judicially know, that the place described in the indictment was purchased under the authority of that statute,) we shall find, from the terms of that statute, that there was not an unconditional consent to the cession. The words are, "that the consent of this Commonwealth be and hereby is granted to the *United States* to purchase a tract of land, not exceeding ten acres, which shall be found necessary for the *Marine Hospital* to be built at *Chelsea* in the county of *Suffolk*, and may hold the same during the continuance of the use and appropriation aforesaid. Provided, that this Commonwealth shall retain, and does hereby retain *concurrent jurisdiction with the United States* in and over said land so far, that all civil and criminal process, issued under the authority of this Commonwealth or any officer thereof, may be executed on any part of said land, or in any building, which may be erected thereon, in the same way and manner, as though this consent had not been granted as aforesaid." And then follows another proviso, "that persons removing upon the tract of land shall be deemed to be inhabitants of *Chelsea*, and enjoy rights and privileges, and perform duties as such, except serving on juries, or doing military duty." The constitution of the *United States* has authorized Congress "to exercise *exclusive legislation* over all places purchased by consent of the legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful build-

ings." And there is nothing in this act of cession, which excludes the exercise of exclusive legislation in this tract of land by Congress, for no power to punish offences committed there is retained by the State. If, therefore, by the terms "sole and exclusive jurisdiction," in the act of 1790, no more is meant, than "exclusive legislation," an indictment founded on that act, so far as this objection goes, might be maintained. In the case of the *Commonwealth vs. Clary*, (8 *Mass. R.* 72,) the Supreme Court of *Massachusetts* considered the mere reservation, in a cession, of a right to execute such civil and criminal process, as not inconsistent with an exclusive jurisdiction in the *United States*. And that decision was adopted and followed by the Circuit Court in *United States vs. Cornell*, (2 *Mason R.* 60.) In the cession referred to in the *United States vs. Cornell*, (2 *Mason R.* 60,) the words, "concurrent jurisdiction" are not to be found in the proviso. But in the cession by the statute of *Massachusetts* (statute 25th of June, 1798,) referred to in the *Commonwealth vs. Clary*, (8 *Mass. R.* 72,) the words, "concurrent jurisdiction" are found in the same connexion. And indeed the clause of the present cession appears to be borrowed, in substance, from that of the statute of 1798. So that the authority is directly in point. The act of Congress of the 2d of March, 1795, ch. 105, seems incidentally to justify the same construction; for it declares cessions for light-houses, &c. made with such reservations, shall be deemed sufficient; and further provides, that where such reservations have not been made, the state process may nevertheless be executed there. But it is not necessary absolutely to decide this point in the present case, since the present indictment does not allege, that the offence was committed in a place under the sole and exclusive jurisdiction of the *United States*; so that it does not judicially appear to be an offence punishable under that act. If there was a concurrent jurisdiction, the offence is clearly not punishable by the act of 1790; if there was an exclusive jurisdiction, that is not shown on the face

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of the indictment. Either way, therefore, we cannot say, that the offence is provided for in the place, where it was committed, so as to be punishable by this Court, if the party had pleaded guilty under the act of 1790.

But it is said, that it is not necessary, that the offence should be so punishable, to except it out of the operation of the third section of the crimes act of 1825 ; all that is required is, that the *offence* should have been provided for by some prior act, as a substantive offence in some place, as in a fort or on the high seas, &c. although not in a hospital. We cannot yield to this argument. The object of the act of 1825 was to provide for the punishment of offences committed in places under the jurisdiction of the *United States*, where the offence was not before punishable by the Courts of the *United States* under the actual circumstances of its commission. The language of the act is, "that if any offence shall be committed in any of the places aforesaid, (that is, forts, dock-yards, &c. or the site of any other needful buildings,) *the punishment* of which offence is not *especially* provided for by any law of the *United States*, such offence shall, upon a conviction in any Court of the *United States*, &c., be liable to, and receive, the same punishment, as the laws of the state, in which such fort, &c. is situate, provide for the like offence, &c." Now, it is plain, that no law of the *United States* punished this offence, if the place was not within its sole and exclusive jurisdiction. It was, therefore, within the very words of the section, an offence, "the punishment of which was not *especially* provided for by any law of the *United States*." The purposes of the section would be wholly defeated by any other construction of the words ; and we can really perceive no solid objection to that, which we have given to it. It appears to us to be a rational and obvious construction of it.

The motion to quash the indictment is therefore overruled.

United States Bank *vs.* Goddard.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE
UNITED STATES

vs.

SAMUEL GODDARD.

Where a note is made payable at a particular place, and the indorser resides there ; if the holder remits it to his agent at such place for payment, and it is dishonoured ; the agent is not bound to give notice of the dishonour to the indorser ; but his duty is to give notice to his principal, who may then give notice to the indorser, and if given in due time after the principal has received notice, the indorser is bound.

If due notice is given by a holder to his immediate indorser, of the dishonor of a note, and the latter gives due notice to a prior indorser, the holder may recover against the latter, although he has never given him any notice ; for due notice given by any party on the bill, is notice to charge in favour of all subsequent parties.

ASSUMPSIT by the plaintiffs, as indorsers of a note, signed by one *J. K. Pickering*, and indorsed by the defendant, dated at *Portsmouth (N. H.)*, on the 1st of January, 1829, for the sum of 1005 dollars, payable to the defendant or order, at the United States Branch Bank in *Boston*, in sixty days and grace. Plea, the general issue.

At the trial the material facts were as follows.

In the winter of 1828–9, *John K. Pickering*, of *Portsmouth*, being deeply insolvent, owed the United States Branch Bank at *Portsmouth* a certain amount, for which they agreed to accept his note for \$1000, endorsed by the defendant. A note, of which the following is a copy, was accordingly given to the bank.

“ *Portsmouth*, Jan. 1st, 1829. Value received, I promise to pay *Samuel Goddard* or order, one thousand dollars, at the United States Branch Bank in *Boston*, in sixty days and grace.”
Endorsed, “ *Samuel Goddard*.”

Mr. *Wentworth*, the cashier of the *Portsmouth* Branch, enclosed this note to Mr. *Frothingham*, the cashier of the *Boston* Branch, in a letter dated March 2nd, in which he says, “ I enclose for collection *J. K. Pickering's* note for \$1000. P. S. I have notified *J. K. Pickering* here, of his note being at your bank.”

He afterwards, at the request of *Pickering*, wrote another letter to the cashier of the *Boston* Branch, under date of March 3d, which was received the 4th, in which he says, "I'll thank you to inform Mr. *Samuel Goddard* that *J. K. Pickering's* note is at your office, as I think he will pay it without protest." It also appeared from the evidence, that *Pickering's* insolvency was known to *Goddard* when the note was endorsed; that *Pickering* never expected to pay it, and that the note was made payable in *Boston*, where *Goddard* resided, for that reason. *Pickering*, about the time of making the note, put into *Goddard's* hands funds, which *Pickering* thought sufficient to pay this note and some other liabilities; but from the depreciation of property, and other causes, these funds proved to be wholly insufficient. *Goddard* had done business in *Boston*, without having a counting-room, during the last two or three years, though he resided principally in *Brookline*; but in November, 1828, he took a house in *Boston*, which, with his family, he has since occupied. It was shown, that *William Stevenson*, a Notary Public, who noted the protest on the note in the case, had also presented to *Goddard*, in February last, a draft or bill, directed to "*Samuel Goddard, Merchant, Boston.*" It was also shown, on the part of the plaintiffs, that *Goddard's* name was not in the Directory, and that his residence was not in fact known to the officers of the Branch Bank in *Boston*, but might have been ascertained by reasonable inquiry. And on the part of the defendant it was shown, that *Nathaniel Goddard, Esq.* a merchant in *Boston*, who was in the habit of doing business at the Branch Bank, was the uncle of the defendant.

The note was not paid at maturity, and the question in the case was, as to the sufficiency of the notice of nonpayment to the defendant. The facts in regard to this question were these. On the 5th of March, the grace on the note expired. On the afternoon of the same day the protest and notices were put into the mail, which closed at *Boston* that evening, and should have

arrived at *Portsmouth* the next morning. But owing to a severe snow-storm, the mail from *Boston* did not arrive at *Portsmouth* until late in the afternoon, and some hours after the mail had gone from *Portsmouth* to *Boston*. On the next day, that is, the 6th of March, *Wentworth* wrote to the defendant a letter, which was put into and sent by the mail of the same day, and which he received on the 8th, stating the non-payment of the note, and requesting him to pay it.

No inquiry was made for the defendant by the officers of the Branch Bank at *Boston*, for the purpose of giving him notice of the nonpayment of the note. And no notice was in fact given, except as above mentioned.

Theophilus Parsons for defendant. Injury to the defendant is to be presumed from laches on the part of those, who should notify him. The endorser is entitled to notice, although perfectly conusant of the insolvency of the maker, and although he puts his name on the paper merely to give it a credit. *Smith vs. Becket*, 13 *East*, 187. This case is confirmed and the principle established in its full extent, in *Brown vs. Maffey*, 15 *East*, 216. The cases, which show this principle to be adopted in this country, are very numerous. There is a very full collection of them in a note to the 211th page of the last American Edition of *Chitty on Bills*.

If the endorser has taken all the property and assets of the maker, or if he has received full indemnity for his indorsement, he loses his right to notice. But though he has at any time effects in his hands as indemnity, if they are afterwards withdrawn or disposed of, he has full right to claim notice; and this is our case. See *Chitty*, 206, and *Clegg vs. Cotton*, 3 *Bos. & Pull.* 239.

The defendant, then, being entitled to notice, the question comes up, whether the notice in the present case was sufficient. The law is now settled, that the holder of a note may have all of the day succeeding its dishonour, wherein to notify the endorser;

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but he can have no more. In this case the notice was insufficient, unless the agent or banker may always send his notices back to the holder, from whom they may go to the endorser. But this principle cannot possibly be adopted without qualification. It cannot be supposed, that a banker may always send notice of non-payment to the holder, however near to him the endorser may reside, however well he may know the domicil of the endorser, and however far from them the holder may live. No case whatever can be found to justify such a principle. The cases relied on by the plaintiffs go upon very different grounds. In the case in 5 *Mass. Rep.* 167, the Court say, the agent of the holder is justified in sending him the notices, because "he may not have known the domicil of the defendant." In 3 *Pick.* 180, (*Eagle Bank vs. Chapin*,) the Court say, the notary did "the best thing for the defendant he could do." In the leading English cases, as in 9 *East*, 347, the agent and the plaintiff, who was principal, lived in London, and the endorser at a distance. Here the case is just the reverse.

It is now perfectly well settled, that a question of this kind is a question of law; that the Court must take into consideration *all* the facts, and determine, whether, on the whole, reasonable diligence was used in informing the endorser of non-payment. Here, it is not enough to say, that the *Boston Branch Bank* must have learnt at once, by the slightest inquiry, the residence of the defendant. The case goes much farther. The cashier of the *Boston Branch* was actually informed of it. Mr. *Wentworth*, living in *Portsmouth*, says to Mr. *Frothingham*, living in *Boston*, on the 2d of March, "I have informed Mr. *Pickering* here, that the note is with you," and on the 3d of March, "I will thank you to inform Mr. *Goddard*." Mr. *Wentworth* would have added nothing to the plain and unavoidable meaning of the letters, had he said, "I have notified Mr. *Pickering* here, because he lives here, and will thank you to inform Mr. *Goddard*, because he lives in *Boston*." Mr. *Frothingham*, then, was in-

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formed, that Mr. *Goddard* lived in *Boston*, and that the note was sent to him in *Boston* to be there paid by Mr. *Goddard*; and certainly, he cannot be justified by any reported case, or by any reason or principle, in sending the notices of non-payment, under these circumstances, to *Portsmouth*, that they might come back again to *Boston*.

Webster in reply. The different branches of the Bank of the *United States*, have no connexion with each other; but treat each other as different institutions. The note was sent for collection. It was not the fund of the general parent bank, but of the *Portsmouth* Branch, and constituted part of specific funds of the latter. There was no request by *Wentworth*, in his letter to the cashier at *Boston*, to give notice of the dishonour of the bill to the defendant, after it was dishonoured; but only antecedently to its becoming due. Nor does it appear, by the letter containing the request, whether the notice was to be given to the defendant as indorser, or as having funds of *Pickering* in his hands.

If the cashier at *Boston* had been requested to give notice of the dishonour, and his residence was pointed out, still the plaintiffs are entitled to recover. It is no part of the contract with the indorser, that he shall receive notice of the dishonour, at the place, where the note is made payable, or from the holder or his agent there. It is *res inter alios acta*.

The agent is in no case bound to give notice to the indorser. He may contract so to do; and if he then neglects, he may be responsible to his principal; but the indorser has no rights from such a contract. The practice, in all cases of this sort, is, for the bank to return the note protested to the holder, and not to give notice to the indorser. [This was admitted on the other side.] If the indorser receives notice from the holder within the time required by law, he has no right to say, that an agent might have given earlier notice. The note here was returned according to the course of business; and it is admitted that the notice was in due time, if the agent was not bound to give notice.

The cases in *Bayley on Bills*, 173, and 5 *Mass. R.* 167 ; 2 *Johns. Cas.* 1, are in point. The cases, too, of the bankers in 3 *Bos. & Pull.* 599 ; 9 *East*, 347 ; and 15 *East*, 291, are decisive in our favour. The principle is quite as strong, where the agent, and holder, and indorser live in the same place, as if they live in different places.

STORY J. I lay out of the case all consideration of the fact, that the note belonged to the Branch Bank at *Portsmouth*, and was remitted to the Branch Bank at *Boston* for collection, both these branches being but agents of the Bank of the *United States*, the real holder of the note. In the first place, it is admitted, that the known course of business in each of the branches is, in respect to all notes transmitted from another branch, to deal with them in the same manner as if transmitted by a stranger bank, and to return their notes back, upon their dishonour, to the branch, from which they have been received. In the next place, the branches being established by the parent bank for its own particular purposes, their agency may be limited and controlled according to the pleasure of the parent bank. So that the present case does not at all differ from that of a private principal, who employs different agents in different cities to transact business, or negotiate, and discount, and collect, notes there upon his account. No distinction was pointed out at the argument, as growing out of this circumstance, differing the case from the common case of holder and agent, or holder and banker ; and none is believed to exist.

The case may, therefore, for all the purposes of this suit, be considered as if the *Portsmouth* Branch were the real holder of the note, and wholly unconnected with the Branch in *Boston*, and employing the latter as its agent to collect the note when due.

The question, then, is, whether notice of the dishonour ought to have been given by the Branch Bank at *Boston* to the defendant, or whether the notice sent by the Branch Bank at

Portsmouth to the defendant was in due time, and sufficient in point of law. It is admitted, that there is no objection to the notice on the account of the delay of its arrival to the defendant until the 8th of March, when it ought regularly to have arrived on the 7th. The snow-storm sufficiently accounts for that; and the notice was given as early by the holder, as, under the circumstances, it could or ought to be.

The case is narrowed down, then, to the consideration, whether by law the defendant was entitled to notice directly from the agent in *Boston*, which, by due inquiry and diligence, he might have given on the 6th of March; or whether a circuitous notice through the holder was sufficient. The argument of the defendant's counsel is this. The agent is bound to give notice of the dishonour, to a prior indorser, who is intended to be charged, if his residence is known to him, or if, upon reasonable inquiry, it can be ascertained, and it is in fact nearer to his own, than that of the indorser, and a notice will thereby reach him earlier than from the principal holder. Reasonable diligence is in all cases sufficient in giving notice; but what is such must be judged of by all the circumstances of each case. If the agent may in all cases omit to give notice to the indorser, then, although he resides in the same city with the indorser, and the principal holder resides at a great distance, the indorser would be held, although a circuitous notice from the holder might not reach him for a week or a month, which would be unreasonable. And it is said, that there is no case, which justifies such a doctrine.

If there be no such case, then the question must be considered upon principle. Now it is very clear, that if the *Boston Branch* had been the holders of the note, they would, under the circumstances, have been entitled to recover against the defendant, since he received due notice from the prior holders, to whom due notice was sent by them, and to whom, upon payment of the note, the defendant would have been answerable over. It is laid down in *Bayley on Bills*, 163, (4th Edit.), and better author-

ity can scarcely be, that "though a holder or *any other party* gives no notice but to the person, of whom he took the bill; yet if notice is communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties. It is no objection, in such case, that there was no notice immediately from the plaintiff to the defendant." And this doctrine is fully supported by decided cases. *Jameson vs. Swinton*, (2 *Camp. R.* 373;) *Wilson vs. Swabey*, (1 *Starkie R.* 34;) *Stanton vs. Blossom*, (14 *Mass. R.* 116;) and *Stafford vs. Yates*, (18 *Johns. R.* 327,) are in point. The reason seems to be, that as the notice is sufficient to charge the defendant with the payment in favour of the person who gives it, it ought to charge him in favour of all subsequent parties, because he sustains no injury from want of notice. It is, as to him, due notice. If, then, as *holders*, they might affect the defendant with responsibility by such circuitry of notice, what is the reason, why, as *agents*, they may not give their principal the same right? If there be any, it must be upon the ground, that the agent is in all cases bound to give direct notice to the indorser intended to be charged, in the same way, and within the same time, and in the same manner, as his principal ought, if there were no agency, and the bill remained in his hands.

Such a proposition has never yet been maintained, as far as I know, by any court of justice. And in the argument it was admitted, that if the domicil of the party, to whom notice is to be given, be unknown to the agent, he is not bound to give any notice. And it has been decided, that when a holder transmits a note for payment to his agent, he is not bound to inform the latter where the prior parties live, so as to enable the agent to give them notice.

But how is it established, that in any case an agent to receive payment of a note is bound to give notice to any person, but his principal, of the dishonour? The nature of the transaction does not necessarily imply it. The authority to receive payment may

be complete, without any incidental authority to give such notice. It is certainly competent for the holder to authorize his agent to do no more than to demand payment, and give him notice of the dishonour. If the agent actually gives notice in due time to the antecedent parties, that may be good in favour of his principal. If the latter requires his agent to give such notice, and he neglects to do it, he may be chargeable with any loss sustained by such neglect. But the question is not, what the agent may do, or ought to do, as between himself and his principal; but whether the other parties, to be charged upon notice, have any right to such notice from him, so as to be discharged by his neglect.

As I understand the doctrine of law upon this subject, it is, that an agent, upon the dishonour of a note remitted to him to procure payment, is bound to give notice of the dishonour to his principal, and transmit to him the proper evidence of it; but he is not bound to give any notice to other parties on the note. That was manifestly the doctrine of the Court in *Haynes vs. Birks*, (3 Bos. & Pull. 599, 601,) where a bill had been remitted to bankers, as agents of the holder, to procure payment; and the argument there was, that in such a case the bankers, being agents of the holder, the defendant (the indorser) was entitled to the same notice, as if the bill had remained in the plaintiff's hands. But the Court overruled the objection; and said that it was the banker's business only to acquaint his principal of the dishonour. The same doctrine was held in *Tunno vs. Lague*, (2 Johns. Cas. 1.) That case is very strong, for the defendant, who was sought to be charged, lived in the city of *New-York*, the bill being drawn by him at *Jeremie (N. J.)* in favour of the plaintiffs, upon a house in *New-York*, and dishonoured by the latter. The notice was not sufficient in the opinion of the Court, having been given at *New-York*, long after the dishonour, if the party giving the notice had been the holder; but being an agent only, it was held, that the notice was sufficient, because it was earlier than the defendant would have had it, if

the bill had been sent back to the plaintiffs, and notice had been sent directly by them. And the Court said, that the *duty* of the agent extended no farther than to give notice to his principal. The same doctrine is also asserted in *Colt vs. Noble* (5 *Mass. R.* 167.) The bill was drawn in *New South Wales*, in favour of the defendant, and by him indorsed at *Madras* to the plaintiffs, who sent it to their agent in *London*, where it was dishonoured by the drawees. The defendant resided in *Portsmouth, N. H.* and the defendant might have sent notice to the defendant at *Portsmouth* in three months ; but he merely transmitted the bill and protests to his principal at *Madras*, who sent notice from thence to the defendant, who did not receive it until more than a year after the dishonour. The Court held the notice sufficient. And Mr. Chief Justice *Parsons*, in delivering the opinion of the Court, said, " A person appointed a factor to cause a bill to be presented is entrusted with no other powers, and it is his duty to notify his principal." It is true, that in that case it did not appear, that the agent knew the defendant's domicil ; but that consideration was not relied on. And the Court decided generally, that the holder was not bound to give information of the domicil of the indorser to his agent ; nor was the latter bound to give notice to the indorser of the dishonour ; and that it made no difference, whether the bill was remitted to the factor to procure acceptance, or in payment of a debt due to him. The case would seem, therefore, to travel on all-fours with the present.

It appears to me, also, that the cases, in which it has been holden, that a banker, who as agent receives the bill of a customer, is only bound to give notice of its dishonour to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice, confirm the doctrine. The legal effect of these cases is, that the customer has the like time to communicate such notice, as if he had received it from a holder ; and therefore by placing a bill or note in the hands of a banker, the number of persons, from whom notice must pass,

is increased by one. So it is laid down in *Bayley on Bills*, 173, (4th edit. ;) and the cases of *Haynes vs. Birks*, (3 Bos. & Pull. 599,) *Scott vs. Lifford*, (9 East R. 347,) and *Langdale vs. Trimmer*, (15 East, 291,) fully support the position ; and it has also been recognised in the recent case of *Firth vs. Thrush*, (8 Barn. & Cresw. 387.) In all these cases, the bankers were agents ; and if they were bound to give notice at all, they might have given it a day earlier than it was received from their principals. But the Court treated the cases exactly as if the agents were holders, and necessarily repudiated the notion, that either as holders or as agents, they were bound to give notice to any other person than their principal. But it is said, that in neither of these cases did it appear, that the bankers knew the residence of the parties, to be charged by notice ; or that the banker's residence was nearer to the parties, than that of the principals. If that be admitted, it is still a sufficient answer, that neither of these facts was treated as material ; and the judgment of the Court proceeded upon a principle, which comprehended all such cases. If the sufficiency of the notice depended upon the fact, whether the agent had no knowledge of the residence of the parties, or lived farther from them than his principal, that fact ought to have come from the plaintiff as part of his case ; for the onus was upon him to show due notice. I am not satisfied, however, that the case in 3 Bos. & Pull. 599, was not a case, where the banker lived nearer to the indorser than to the holder. The latter lived at *Knightsbridge*, and both of the former lived in *London*. But it seems to me, that there is a far stronger reason for requiring that the banker should give notice, where he and the principal live in the same town, or at least that notice in such cases should be given as early, as the principal might give it, if the note were in his own hands, than where the principal resides in a different town, since the communication between them is so much more easy.

It appears to me, that the question now before the Court has been closed by authorities ; if not by direct adjudication, at least by necessary inference. The doctrine is laid down, without any exception, that the agent is not bound to give notice ; and if any exception had existed, it could not for so long a period have been overlooked. But if it were otherwise, and there were no authority in point, my own judgment would be the same. It appears to me, that an agent is not bound to give notice to the indorser of the dishonour of any note ; and that his agency does not naturally include such a duty. If he contracts with his principal to give such notice, that is a mere private contract between the parties, with which the indorser has nothing to do. It neither enlarges, nor limits his rights. It may be inconvenient for him to receive a circuitous notice ; but that is not sufficient to change the law. I think it would be far more inconvenient to establish the doctrine now contended for in the defence. All that is required by law, is, that the holder should give notice to the indorser in a reasonable time after he has knowledge of the dishonour, and that there there should be no laches in getting that knowledge, if an agent has been employed.

This view of the case renders it unnecessary to consider the point, whether, under all the circumstances, the defendant was entitled to notice, he having received security, originally supposed to be sufficient to meet the payment ; as well as some other points suggested in the argument at the bar.

Judgment must therefore be entered for the plaintiffs, according to the verdict.

Judgment accordingly.

Titus vs. Hobart.

WILLIAM A. TITUS AND ANOTHER vs. ENOCH HOBART.

Where a contract is made between citizens of the same State, and the defendant is afterwards discharged under the insolvent act of such State from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought in another State, according to the *lex fori*.

No State regards the forms or modes of remedies in other States to enforce contracts; but acts upon its own processes only.

ASSUMPSIT on a promissory note, dated at *New York* on the 27th of September, 1827, whereby the defendant promised the plaintiffs, by their partnership name of *Titus & Hicks*, to pay them \$568,85, in six months after date. The declaration also contained the usual money counts.

The case came before the Court, by the consent of parties, upon a question what judgment ought to be rendered upon the following facts. The note was given in *New York* by the defendant, then an inhabitant of *New York*, to the plaintiffs, then merchants in *New York*. It was not paid when it fell due. On the 5th of April, 1828, the defendant took the benefit of the insolvent act of *New York*, and received his certificate from the Recorder of the city of *New York*, whereby it was declared, "that the person of the said insolvent shall be forever hereafter exempted from imprisonment for, or by reason of, any debt or debts due at the time of making the said assignment, or contracted for before that time, though payable afterwards, and if in prison from his imprisonment; and all sheriffs and other officers are authorized to cease from imprisoning hereafter the said insolvent on any writ, process, or execution, for any such debt or debts as aforesaid."

Ward, for the defendant, contended, that the judgment and execution ought to go only against the goods and estate of the defendant, and he cited 3 *Mason R.* 88; 12 *Wheaton R.* 213; 5 *Mass. R.* 509; 10 *Mass. R.* 337.

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Dunlap, for the plaintiff, argued, that the judgment ought to be general, and he cited 1 *Dall. R.* 190, 191; 3 *Mason R.* 88.

STORY J. This case differs from that of *Hinkley vs. Murean*, (3 *Mason R.* 88,) in one circumstance only, and that is, that both of the parties were citizens of *New York* at the time of the discharge and certificate granted to the insolvent. There is no pretence to say, that the insolvent act of *New York* operates a discharge or dissolution of the contract. It purports to do no more than discharge the person from imprisonment for antecedent debts. Now, nothing is better settled, than that the effect of such a discharge is purely local. It is addressed to the Courts of the State, under whose authority the exemption is allowed. But it has nothing to do with the process, proceedings, or judgments of the Courts of other States; which are governed altogether by their own municipal jurisprudence. Whenever a remedy exists, it is administered according to the *lex fori*, and such judgment is given, as the laws of the State, where the suit is brought, authorize; and not such, as the laws of other States authorize. The distinction between the *obligation* of contracts, and the *mode* of applying remedies thereto, is well established. The former is universally recognised according to the law of the place, where the contract is made; the latter is bounded by the territorial limits, and is not of efficiency elsewhere. A general judgment therefore, according to our law, must be entered; and not such a judgment, as might be taken in *New York* under the insolvent act, even if it would be a judgment limited to the goods and estate of the insolvent.

Judgment accordingly.

THOMAS KNOX vs. RICHARD DEVENS.

By the act of Congress of 1799, ch. 128, consignees are authorized to enter goods, and give bonds for the duties. In such case the *United States* have no remedy over against the owner of the goods, for whom the consignee acts as agent or trustee, if the duties are not paid.

If a surety for a consignee on a custom-house bond pays the debt, he has no remedy against the owner for the amount, if the latter did not request the surety to sign the bond; but the remedy for the surety is against the consignee only.

Assumpsit upon the money counts. The parties agreed upon the following special statement of facts.

Mr. *Thomas Battelle* of the island of *St. Croix*, having sold some property for the defendant, Mr. *Devens*, on a credit, remitted the proceeds, as he collected them, in bills of exchange and the produce of the island. On the last of July, 1826, no opportunity offering for *Boston*, he shipped 16 puncheons of rum on board the schooner *Rampart*, Capt. *Morgan*, bound for *New York*, and consigned the same to Messrs. *G. & H. Lewis* for account of Mr. *Devens*. There was no previous authority thus to consign, and the house of *G. & H. Lewis* were strangers to Mr. *Devens*. On the arrival of the rum in *New York*, the latter part of August, the same was stored by the Messrs *Lewis* in the custom-house stores on the 29th of August; but of its arrival they gave no notice to Mr. *Devens*. On the 7th of September, Mr. *Devens* wrote to the Messrs. *Lewis* as follows. "Mr. *T. Battelle* of *St. Croix* has advised me, that he shall ship, on my account, to your address, 16 puncheons rum per schooner *Rampart*. I write the present for the purpose of requesting, that on the receipt of the rum you will dispose of it to the best advantage, either for cash or credit. I wish you to guarantee the debt if you sell on credit, and remit me the net proceeds as soon as possible." To which letter the Messrs. *Lewis* replied on the 9th September as follows.

"Sir,—We have received your favour of the 7th, and will, as you direct, dispose of your 16 puncheons of rum as soon as

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practicable. The article is very dull at present, but we expect there will be some demand in a few days. We could not sell for cash without a great sacrifice, but will guarantee the debt, and hope to send you the sales very shortly. With a tender of our best services here, we remain respectfully, &c."

Boston, 27th December, 1826.

Messrs. G. & H. Lewis,

Gentlemen,—Yours of the 9th of September is the last advice I have from you respecting the rum sent to you by Mr. Battelle. I hope, that before this time you have been able to dispose of it, and shall be obliged by your informing me of the result. Respectfully yours.

R. D.

New York, 2d January, 1827.

Mr. Richard Devens,

Sir,—We have duly received your favor of the 27th ult. and now hand you account sales of your rum, received per schooner *Rampart*. We did suppose they had been sent some time since. We were compelled to give a long credit on the rum, as the article was at that time of very difficult sale. Respectfully we remain your obedient servants.

G. & H. LEWIS.

Boston, 5th January, 1827.

Messrs. G. & H. Lewis,

Gentlemen,—I have received yours of 2d inst. with account sales of rum per *Rampart*, in which there are others beside myself interested. I will therefore thank you to deduct interest, and remit me the net amount, which will enable me to settle the account. Respectfully yours.

R. D.

Boston, 13th February, 1827.

Messrs. G. & H. Lewis,

Gentlemen,—I wrote you on the 5th, respecting the net proceeds of 16 puncheons rum you received per *Rampart*, and requested you to remit me the net proceeds, but have never received an answer to my letter. On receipt of my present com-

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munication, please pay over to Messrs. *Goodhue & Co.* the amount due me, deducting interest. Yours respectfully.

R. D.

The said rum lay in the custom-house stores till the 18th of September, 1826, when the same was entered at the custom-house in *New York*, (the form of entry saying nothing of the ownership, which, on articles paying a specific duty, is not required at *New York*,) and the bill of lading and invoice presented at the same time at the custom-house ; both stating, that the rum was shipped for account and risk of *R. Devens*. *G. L. Lewis*, one of the house of *G. & H. Lewis*, as principal, and the plaintiff, *Thomas Knox*, as his surety, gave bonds for the duties on the rum, amounting to \$705,60 ; one half payable in six months, and one half in nine months. Before either bond became due, *G. & H. Lewis* failed, and the plaintiff, *Knox*, as surety, was called upon by the collector, and paid the bonds, one half on the 19th of March, and one half on the 19th of June, 1829, being the days next after the said duties were due. On the 2d of January, 1827, *G. & H. Lewis* sent to said *Devens* an account sales of said rum, a copy whereof is hereto annexed, but they have never paid the balance thereof to the said *Devens*. On the 17th of January, 1827, *G. & H. Lewis* made an assignment to *T. Knox*, *C. J. Johnson*, and *J. A. Johnson*, to secure the payment of bonds due to the *United States*, a copy of which is annexed. Upon this assignment, the assignees, it is said, have realized but \$2728,17, as per account annexed, and they believe there is very little probability of any thing more being received, many of the debts assigned being good for nothing, and those against *Battelle*, *Gray*, and *T. Battelle*, having been compromised by taking *T. Battelle's* six notes of \$1000 each, payable in one to six years without interest, the first of which notes became due on the 1st of January, 1829, and only \$500 has been paid upon the same, and it is doubtful if any more will be received from him. It is also agreed, that said *Devens* and *Knox* were wholly unac-

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quainted, and that *Devens* never requested him to sign, nor knew of his signing, the bonds given to secure the duties on the rum. Nor did said *Devens* ever know it till he was called upon immediately before the commencement of the present action.

Sales of 16 puncheons rum, D. per schooner Rampart, Morgan, Master, from St. Croix, account of R. Devens, of Boston.

				Punch's.	Net gls.	Price.	
Sept. 23.	By Stanton & Suydam	10 mo. 3d pf.		5	533	70	\$373,10
" "	" Heriman & Nash	6 " " "		7	752	68	511,36
" 29.	" J. B. H. Odiorne	10 " " "		4	425	70	297,50
				16	1710		\$1181,96

CHARGES.

Aug. 29.	To duties on 1680 gals. 3d. pf. at 42	\$705,60	
	bond & permit \$1,20, advertising \$2,50. }		6,14
	labor \$2,44		
	storage \$4, cooperage \$2,72		6,72
	freight \$64, lighterage \$4,		68,00
	insurance on \$480, at one and a quarter		
	per cent.—half per cent. commission	8,40	
	commissions and guarantee, 5 per cent.	59,10	853,96
	net proceeds to credit of <i>R. Devens</i> , due		
	4th June, 1827		\$328,00
Errors etc. excepted.			

New York, 30th September, 1826.

(Signed) G. & H. LEWIS.

Webster and *Peabody* for the plaintiff. This is a case in which the foreign correspondent of the defendant, within the scope of his orders, shipped on account and risk of the defendant, certain foreign goods, to *G. & H. Lewis* of *New York*. Neither the defendant nor the *Lewises* had any previous knowledge of the intention of the foreign correspondent to make the shipment. But after it was made known to them, both parties approved of and confirmed the consignment; and the *Lewises* accepted and entered the goods, and *Devens* gave them orders to dispose of them.

On the arrival of the goods, and their being entered by the *Lewises* at the Custom-house, one of them became principal, and on their request the plaintiff became surety, on bonds for the payment of the duties to the *United States*. Before the bonds became due the *Lewises* failed, and the plaintiff as surety was compelled to pay them.

He now seeks a remedy by a suit against *Devens*, to recover the amount of the bonds, as money paid to his use, at his request.

To sustain his claim, the plaintiff must show, that the amount of the bonds was paid to the use of *Devens*, and at his request, or on the request of some authorized agent for him. And 1. If upon the whole case it appears, that *Devens* was the importer of the goods, or that by the act of Importation he became liable for the duties thereon; then, whoever paid the duties on the importation, paid them for the benefit or use of *Devens*. And 2. If such payment was made necessarily by a surety, who became surety at the request of *Devens's* agent, it was made on *Devens's* request.

1. Was *Devens* the importer? or was he, by the act of importation, a debtor to the *United States* for the duties accruing on the importation?

Devens was the owner of the goods, when shipped from *St. Croix* by *Battelle*. The shipment was made in pursuance of *Battelle's* authority; and from the moment that the goods were on board, till they arrived at *New York*, and were entered and sold, and the proceeds realized by *Devens*, they were at his risk. The *Lewises* were as ignorant of the intended shipment to them, as *Devens* was. Neither had notice of it till the goods arrived at *New York*, and notice of the shipment was received by *Devens*. When that was done, both approved of the shipment on the terms of it. This appears, by the *Lewises's* receiving and entering the goods, and by *Devens's* giving them orders for their sale. On their arrival it was in the power of *Devens* to have removed them into other hands, or to have ordered them to

Boston, into his own stores ; but he preferred to confirm the consignment to the *Lewises*, and order them to sell them for his account.

Who, then, was the importer, and as such incurred the liability to pay the duties on their importation ? Was it *Devens*, by whose procurement they were brought into the country ? or the *Lewises*, who knew nothing of them, till they arrived in *New York*, to their address, on account and risk of *Devens* ?

In the case of the *United States vs. Lyman*, (1 *Mason R.* 482,) the general doctrine was discussed at length ; and the decision in that case has generally been approved. If it has sometimes been questioned, it has never been over-ruled, and may be now referred to as a decision, with which this Court is satisfied, and which no one has chosen to call in question before the only tribunal, which has the power of controlling the decisions of this Court.

In that case it was decided, that by the Act of Importation, the importer incurred a personal debt to the government for the duties ; and that a bond given for that debt, by other persons, is not an extinguishment of the debt, but only collateral thereto. 1 *Mason's R.* 505.

By the Act of Importation, then, the importer incurred a debt to the *United States*, which *Knox*, the plaintiff, was compelled to pay, by force of the bond.

If *Devens* was the importer, that debt was paid for him, and its payment relieved him from a liability to the *United States*, which he would still be liable under, but for the plaintiff's payment of the bonds in question. None but *Devens* or the *Lewises* could be the importer. Which of them was it ? *Devens*, by whose procurement the goods were introduced into the country ? or the *Lewises*, who knew nothing of them till their arrival in *New-York*, to their address, on account of *Devens* ?

By our statutes, the owner or consignee, or in their absence, their agents or factors, are the only persons entitled to enter and bond the goods ; he who enters and bonds, is not, therefore, *ipso*

facto, importer. By referring to the common definition of terms, we shall find, that he who causes the thing to be imported, is the importer. But he may be a citizen and resident of a foreign country, and beyond the reach of our laws. It is for this reason, that by our statute the consignee, as well as the owner, is made liable for the duties; and by this provision the government are secure, that if the goods are received into the country, some one will be found, within the jurisdiction of the government, liable for the duties. The owner is the immediate debtor; and the consignee seems to be a substitute, when the owner is a foreigner, residing abroad; or like a bondsman collaterally liable, if the owner be a *United States* citizen, residing at home.

The alternative of owner or consignee is only provided, that some person may be always found under the jurisdiction, liable for the duties. The owner or importer is still liable, and the consignee is added only as a substitute, if the owner be not within the reach of the government's process; or as a collateral surety, if the owner reside here. It is difficult to conceive, that the foreign merchant is the importer, if he come with his goods, consigned to his own order, and after arrival and before entry, consign them to a merchant here,—and not the importer, if he remain at home, and send his written order with the goods, consigning them to a merchant here, who knows nothing of the shipment, till the arrival of the goods.

In England the duties are usually paid on the entry of the goods. When by accident or mistake the goods are delivered without the payment of the duties, it becomes necessary to resort to those who incur the debt by the Act of Importation. And they are always considered liable till the duties are paid; and every one who is owner or interested in the goods, is so liable. And if the owner reside abroad, the factor within the kingdom, having no interest but his commissions, is liable. And if several are jointly interested, the crown may recover the duties of any one interested. *Manning's Practice of the Court of Exch.* 203.

Skinner, for himself and four others, made an importation, and entered the goods ; and by mistake received them without paying the customs. *Skinner* then became bankrupt, and his whole effects were distributed. On information, the whole five interested were held debtors to the crown, and they all remained liable, till the duties were paid. *Attorney-General vs. Stanyforth et al.*, *Bunb.* 97.

If the owner, being within the government, by the Act of Importation is liable, and becomes the principal debtor for the duties, it only remains to ascertain who was the owner of the goods in question, at the time of their importation. They were purchased with the funds of *Devens*, and by his procurement, and in pursuance of his orders shipped to this country. They came on his account and risk ; and until their being landed and entered, and bonded, it does not appear that any other person had any interest in, or control over them. It does not appear, that the *Lewises* had any knowledge of the shipment till the arrival of the goods, or any interest in them at any time, beyond their commissions. On their arrival, both before and after their being entered and bonded, it was at *Devens's* option to take the goods into his own possession, or consign them for sale to any other house. But he chose to give orders to the *Lewises* to sell them for his account. *Devens* appears, therefore, to have been both the sole owner and importer. By the Act of Importation he became the debtor of the government, for the duties. The plaintiff by paying them discharged a debt to *Devens*, and therefore paid the money to his use. If it were paid at his request, or at the request of any one authorized to act for him, the plaintiff's title to recover is made out. The *Lewises* were the agents of *Devens*, acting in that capacity for a commission. They received the goods for his account, at first by the order of his foreign agent, and afterwards entered and sold them, by his own order. If one requests another to enter and bond goods for him, inasmuch as he knows there must be a surety, by this act he im-

pliedly directs his correspondent to request some one to become surety, and he who so becomes surety, and is thereupon obliged to pay the duties, does it by the request of the owner, to relieve him from a debt to the government, which he cannot evade without payment.

The object of our government, in making the existing laws, is to secure, in all events, the payment of the duties on importations; and their payment being secured, to give every possible facility and indulgence to the merchant.

If the importer, by the Act of Importation, incurs a debt to the government, he must remain liable for that debt till it is paid; and he who pays it, pays money for the relief and to the use of the importer.

If the doctrine be established, that the consignee of one of our own citizens, residing at home, is the sole importer, and alone becomes liable for the duties, a door for fraud will, by such a decision, be opened, as wide as could be wished for unprincipled speculation; and the government may be indefinitely defrauded of its revenue.

If a merchant in any other place, have a debtor in *New York*, with credit enough to enter goods, and give a bondsman equally responsible with himself, but without property to pay his debts, that creditor may carry a cargo to *St. Thomas*, and consign it to a known correspondent of his delinquent debtor, and order the proceeds to be invested in produce and shipped by the first vessel to the *United States*, after he has found that such vessel will go to *New York*. He will thus be secure, that the return cargo will go to his insolvent correspondent in *New York*, without his having ordered it, or given any directions to that effect. After it is entered and bonded, he may take it into his own hands, and give his insolvent debtor credit for the duties, and thus securely transfer his debt to the *United States*. Such speculations may be safely made, and doubtless will be, if the existing laws are found so far to fail of their object, that correct judicial constructions of them will encourage such adventures.

This is only one case, in which fraud might be practised under such a decision as the defendant's counsel contend for ; but many others might easily be contrived by common ingenuity.

Welsh for the defendant. The plaintiff in this action claims of the defendant to be reimbursed by him the amount of duties, paid as surety on certain bonds given to the *United States*, by *Gabriel Lewis*, of *New York*, as principal, and the plaintiff as surety, the conditions of which were, that the said *Lewis* should pay to the *United States* the duties accruing on the importation of sixteen hogsheads of rum, shipped and consigned to *G. & L. Lewis*, by *Thomas Battelle*, of *St. Croix*, on account of the defendant, who was the owner of the rum. Before the bonds became due, the *Lewises* failed, and when due, were paid by the plaintiff as surety.

It is urged, that the defendant is bound to refund the amount of the duties thus paid, because he was the importer of the goods, and that, by the Act of Importation, he became liable for the duties, and that whoever paid the duties, paid them for his benefit or use.

Suppose it be true, that the defendant, being the owner of the goods, was liable for the duties on their importation, and so continued until they were entered, and the duties secured by the bond given by *Lewis*, as principal, and *Knox*, as surety ; from that moment, his personal liability to the *United States*, and the lien, which until then had attached on the goods, were dissolved. The reception of the bonds by the *United States* was a full satisfaction of any claim, which by statute, or general principles of law, the *United States* had against the person of the owner, or importer, or the goods ; and of course, if the bonds had not been paid, the *United States* could not have recovered the amount of duties from the owner of the goods.

The plaintiff relies on the authority of the case of the *United States vs. Lyman*, (1 *Mason R.* 505,) for the support of his first position, that a bond given to the *United States* is not an extin-

guishment of the debt accruing to the *United States*, on the importation of merchandise. It is of no importance to ascertain, how far the *United States* has, if any, cumulative remedies for the collection of debts, contracted with them by the importation of merchandise, as it is certain, that they are not transferable to a surety in a bond given to secure such duties.

But it is denied, that the defendant, although the owner, was the importer of the rum, or that, in that character, he was ever personally liable for the amount of the duties, which became due to the *United States* on its importation. It will be seen, in the 128th Chapter of the Revenue Act of 1799, that the owner, or consignee, or in case of his absence, or sickness, his factor, or agent, are the only persons, to whom the law allows a credit for the duties, to be given at the custom-house. Upon which, Judge *Story* inquires, in *The United States vs. Lyman*, "From whom, then, does the debt accrue?" And he answers, "Beyond all doubt from the importer, be he the owner, or the consignee of the goods." It is undeniable, then, that the debt accruing to the *United States* on the importation of the sixteen hogsheads of rum, was a debt contracted by the importers, the Messrs. *Lewis*, and was never the debt of the defendant, because he was absent from *New York*, and a resident merchant of *Boston*, at the time of the importation of the rum into the former place, was not consignee, nor, in any legal sense, the importer.

The provisions of the law are positive, and it is against all rules of construction, to give to them a different signification, by supposing an intention in the legislature, at variance with the language used.

The reason given by Judge *Story*, in the case of the *United States vs. Lyman*, for his opinion, that the debt, which accrued to the *United States* on the importation of the teas, was not extinguished by the bonds given to secure the payment of the duties, was, that they were the bonds of a purchaser, who had no interest in them at the time of the importation, and could,

therefore, be considered only as collateral security, and not an extinguishment of the debt. This makes it a different case from the present.

But whether the Messrs. *Lewis*, or the defendant, be considered the importers of the rum; in either case, the claim, which the *United States* had on the latter, as owner, at the time of its importation, was extinguished, and became merged in the bond, which *Lewis*, as principal, and *Knox*, as surety, gave to the *United States*, for those duties.

In the case of *United States vs. Astley et al.*, (3 *Washington's R.* 508,) it is virtually decided, that the *United States*, by taking a bond to secure the duties on goods, extinguished the debt, for which it was given, and no distinction is made between the bond of a stranger, owner, consignee, or importer.

In *Tom vs. Goodrich et al.*, (2 *Johnson*, 213,) it was decided by Justice *Thompson*, that the giving of a bond to secure the payment of duties on merchandise, was an extinguishment of the debt to the *United States* for those duties.

It is clear, from all the cases, in which this question has presented itself, that the acceptance of the bond is an extinguishment of the simple contract debt, due to the *United States* for the duties, inasmuch as it is a security of a higher character.

The liability, then, to pay the debt accruing to the *United States* on the importation of this rum, was on the *Lewises*; and the plaintiff, the surety in the bonds given to secure this debt, must be considered as having incurred his liability on their account, on their credit, and at their request; and it is to them, that he must have recourse for the reimbursement of the money, which he has paid to the *United States*, as surety on their bonds. Indeed it is evident from his conduct, that he had incurred this liability on their sole credit; for he takes from them an assignment of all their effects in January, 1827, to secure these and other bonds, in which he had become their surety; he gives no notice to the defendant, that he should hold him responsible, as

the owner of the goods, for the amount he might be called on to pay, in case of the *Lewises'* default. The defendant was a stranger, and unknown to him, as owner, until after the failure, of Messrs. *Lewis*, and not until he had ascertained, that he was not secured by the property assigned to him, did he give the defendant notice, that he held him responsible for the amount of duties on the rum, which he had paid.

Where a party is called on to pay money in consequence of another, having paid money, as his surety on a bond, the execution of the instrument must be proved, and it must be shown, that he signed the bond at the request of the principal.

All the facts in the case prove, that the plaintiff became surety in these bonds at the request, and for the accommodation of the *Lewises*, who held the goods, on which the duties accrued, or the proceeds of them, as a fund, with which they could pay the bonds.

No case has been shown, or can be found, of an implied promise to indemnify a surety, except by persons, at whose request the surety executed the bond, and who were parties to it. It has never been extended beyond the parties, who executed the instrument.

In the case of *Tom vs. Goodrich et al.*, before cited, which is the case of a surety, who signed a bond for duties for one of a firm, as principal, on merchandise imported by the firm, Justice *Thompson* says, the law does not imply a promise by all the persons, who may be benefited in consequence of payment by a surety, but only by the person, whose debt is discharged.

Chief Justice *Kent*, in the same case, observes, "The plaintiff executed the bond as his surety, and cannot charge any other person as principal. There is no privity between the parties, but what arises from the bond. It would be refining upon the doctrine of implied assumpsits, and going beyond every case, to consider the surety in a bond as having, by that act, a remedy at law against other persons, for whom the principal in the bond may have acted as trustee."

The cases cited by the plaintiff's counsel from the Exchequer Reports, and their observations upon them, have no application to questions arising on bonds given to the *United States*, as security for duties on goods imported into this country. The laws of *Great Britain* require, that the duties on goods entered for consumption, should be paid in money. No bonds are taken in that case ; the system of credits for duties, which is almost universally practised in this, is unknown in that country. In the cases cited by them, the lien on the goods for the duties attached to them, and the claim against the importers, who were the joint owners, was unimpaired, and it was merely decided, that the crown could recover the duties of either of the joint owners. There is no doubt, that this Court, under the same circumstances, would have made a similar decision ; but this is not the case under consideration.

There can be no such fraud practised on the government, as the plaintiff's counsel apprehend from the establishment of the principles, on which the defence in this case is predicated. It is true, that a solitary instance might occasionally occur, of a merchant's consigning goods to his insolvent debtor, and inducing him to enter them, as consignee, or importer, give his security for the duties, and charge his creditor, the owner of the goods, with those duties, and in that way secure his debt ; but to effect such an object, there must be the co-operation of another party, the surety, and there must be a risk incurred by the creditor, which he would not willingly do, of placing more property under the controul of his debtor ; and above all, it would be a fraud on the government, which could not fail of being discovered.

Besides, consignees being generally commission merchants, and not so much exposed to the casualties of trade, would afford better security to the government for the payment of the duties on goods consigned to them, than merchants of other classes.

The law has existed a long time, and if such frauds had been practicable under colour of its provisions, they must have been

known, as they must in all cases have occasioned losses to the government, which it is well known have been very small.

The inconvenience and losses in trade, which would arise from these lurking liabilities, which the plaintiff's counsel contend for, would be far more formidable evils, than any, which the government would experience from a different doctrine.

If the law be defective in this respect, the remedy must be by legislation, and not by construction.

S. Hubbard on the same side. There is no privity of contract between those parties; and if any claim, therefore, exists on the part of the plaintiff, it arises from the legal liability of the defendant. Now to maintain, that there is such a legal liability, the plaintiff must himself satisfy the Court, that the defendant was personally liable to pay these duties. And the plaintiff, aware of this, asserts, that the defendant was importer of the goods; but the facts warrant no such assertion. The rum was shipped by *Battelle*, and consigned to *G. & H. Lewis*, without the order or knowledge of the defendant. It was actually imported into *New York*, and the consignment accepted by the *Lewises*, without his knowledge. By receiving the consignment, the Messrs, *Lewis* became the importers and as such legally liable to the *United States*, and not the owner; for the statute, in our judgment, does not make both owner and consignee as such, responsible. In this case, the defendant residing in another state is to be considered as a foreigner; (and citizens of other states are often so treated, in their commercial transactions. 4 *Wheat.* 438, *The Gen. Smith*; 2 *Peters*, 586, *Buckner vs. Finley*;) and as an absent foreigner, he was not liable for the duties. The legal liability, therefore, was incurred by the Messrs. *Lewis*, and not by the defendant. For whom, then, was the plaintiff surety? not for the defendant. The incidental benefit accruing to the defendant, does not raise a cause of action against him. But the plaintiff was surety for only one of the Messrs. *Lewis*; he had then no claim even on them. It was not

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the individual Mr. *Lewis*, that signed the bond, who was the agent of the defendant ; but the Messrs. *Lewis* were joint agents. If the plaintiff, then, had no claim on the agents of the defendant, surely he has not on the defendant, of whom he was wholly ignorant, when he signed the bond ; and the cases of *United States vs. Astley*, and *Goodrich vs. Tom*, cited by Mr. *Welsh*, and the case of *Sluby vs. Champlin*, 4 *Johns.* 461, clearly maintain this position of the defendant.

Once more, no right of action exists in this case, because the plaintiff has paid the Messrs. *Lewis*, his agents, the amount of this bond. It will be recollected, that the goods were consigned by *Battelle*, without the knowledge of the defendant. When he heard of the consignment, he gave orders to sell for cash, or guaranty the sales. The Messrs. *Lewis* accepted the consignment under these instructions, and they had, therefore, no authority to contract any debt for the defendant, nor to bind him personally, for liabilities incurred by them, in entering, storing, and disposing of the goods ; and having by the sale received the proceeds of the goods under their own guaranty, before their insolvency, no debt existed against the defendant, at the time when the bond was paid. Of what avail would be the directions to sell for cash, and under guaranty, if the owner of goods, notwithstanding, may be charged with every debt of every person employed by the commission merchant in relation to his goods. Such a cosequence would be much more detrimental to the intercourse among merchants, and eventually more injurious to the revenue of the *United States*, than the evils to be apprehended from treating the importer as the person legally liable for the duties on goods, and not the owner, unless he be importer also.

STORY J. If I thought any thing, which I should decide in this case, would shake in any, the most remote degree, the decision in *United States vs. Lyman*, (1 *Mason R.* 482,) I should exceedingly regret it, for to that decision, after much considera-

tion, my mind deliberately adheres. But it appears to me, that the present case stands upon wholly independent principles. In the case of *United States vs. Lyman*, Mr. *Lyman* was both *owner* and *consignee* at the time when the goods were imported. After the entry of the ship at the custom-house he sold the teas in question, and the purchaser, after the sale, gave a bond at the custom-house for the duties. No question arose there, whether the *United States* had a remedy against the *owner* of the goods for the duties, where they had been originally consigned to a third person, who had regularly entered them as *consignee*, and given a bond for the duties. Upon that question, as at present advised, I should have arrived at a very different conclusion from that, which governed the Court in the former case.

The Revenue Collection Act of 1799, ch. 128, (§ 36,) provides, that the entry of foreign goods, imported into the *United States*, shall be made at the custom-house by the *owner* or *owners*, *consignee* or *consignees*, or, in their absence or sickness, by their known agent or factor; and it prescribes an oath to be taken on that occasion. Before any permit to land the same goods can be obtained, the duties must be paid, or secured to be paid, by the importer, (whether he be owner or consignee,) in the manner prescribed by the 62d section of the same act. If the act had stopped here, there would not seem much room to doubt its real object and purport. Importations might be made by persons resident in the State or District on their own account. They might, on the other hand, be made by such persons, not on their own account, but for the use and benefit of third persons. In each case, the party making the importation, whether on his own account, or for others, may properly and technically be deemed the importer. It could not have escaped the notice of Congress, that the course of trade was to import largely on consignment, sometimes for the use and benefit of a foreign merchant, and sometimes for the use and benefit of a distant domestic merchant. In either case it would be highly inconvenient to

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require, that the real owners should give bonds for the duties, or that the usual terms of credit in other cases should be withdrawn from them. When, therefore, the Act required, that the consignee should enter the goods, and should give bonds for the payment of duties in the same manner as the owner; when, in the same sentence, *uno flatu*, it treats the consignee as having the same rights and the same responsibility as the owner; when it farther deems the *importer* the real and original debtor for the duties due on importation; the natural inference is, that, for the purposes of the act, the consignee is deemed the owner, and that he and he alone is the original debtor for the duties.¹ But the act does not leave this to mere inference from general principles of interpretation. It expressly declares, in the close of the 62d section, in order to prevent frauds arising from collusive transfers, “that all goods, &c. imported into the *United States*, shall, *for the purposes of this act*, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer, or assignment, prior to the entry and payment, or securing the payment of the duties on the said goods, &c. and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding.” So that in respect to the *United States* and the payment of duties, the consignee is treated as the real owner. How, then, can it be said, that if the consignee, after giving bond with sureties for the duties, should fail, so that the bond should remain unsatisfied, the *United States* might still elect to proceed against the real owner for the payment of duties, when the act has declared, that the consignee shall be deemed the owner for the purposes of the act? That would be to hold him owner and not owner in the same breath? It appears to me, that when a person is a *bonâ fide* consignee, the liability to pay duties attaches to him as importer,

¹ See *Attorney General vs. Strayforth*, Bunb. R. 97.—*Attorney General vs. Weeks*, Bunb. R. 223, 224.—*United States vs. Hathaway*, 3 Mason R. 324, 327.

and to him only ; and that, with reference both to the language and the policy of the act, it matters not, who may be the parties having any ulterior beneficiary interest in the goods. The law looks to the fact of consignment, and recognises the party, who appears as consignee on the manifest and bill of lading and invoice, (which are to govern the entry,) as the substantial owner. It does not choose to trust to the uncertain results of other evidence to establish the true ownership ; but it adopts a convenient and easy rule, by which to guide public officers promptly in their duty, as well as parties in their responsibility. Why else is there such solicitude manifested throughout the act upon the subject of consignments? The master is required in his manifest to state the name of the consignee. The original bill of lading and invoice are to be produced and sworn to upon the entry ; and the fact is to be stated upon oath, whether the goods are on account of the party or on consignment. But in cases of consignment the names of the actual owner of the goods is not required to be disclosed. If, on the other hand, the entry is by a mere agent or factor, the name of the party, for whom he acts, whether he be owner or consignee, is required to be disclosed.² I cannot therefore admit, that, in the case of a genuine *bonâ fide* consignment, the owner of the goods, (not being the consignee,) whether he be a foreigner or a domiciled citizen, would, upon the failure of the consignee to pay the bond given for duties, be responsible to the *United States* therefor. What would be the case, where the consignment was fraudulent, and intended as a cheat upon the *United States*, it is not necessary to decide. That might perhaps justify the application of other principles.

The argument, then, so far as it is bottomed upon the ground, that the defendant would have been liable to the *United States* for the duties, if they had remained unpaid, cannot be support-

² See act of 1799, ch. 128, § 32, 36, 62.—See also *Attorney General vs. Weeks*, Bunb. R. 323, 324.

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ed. I agree, that the importer is liable for the duties to the *United States*; but I cannot agree, that the Messrs. *Lewis* were not, in the sense of the act of Congress, importers, and personally and exclusively liable as consignees for the duties.

But if it were otherwise, it would by no means follow, that because the defendant might be personally liable for the duties to the *United States*, therefore the plaintiff, having paid them, is entitled to recover the amount from the defendant. To justify such a conclusion there must be some privity established between the parties. If the plaintiff had paid the duties, or had become surety on the custom-house bond, at the request of the defendant, that might have raised an implied obligation on his part to indemnify the plaintiff. But the facts of the present case raise no such presumption. The goods were consigned to the Messrs. *Lewis*; and were entered by them, as consignees, at the custom-house, in the manner authorized and prescribed by law. One of the firm gave his bond for the duties, and the plaintiff became surety on that bond, at the request of the principal in the bond, without any notice to, or any request of the defendant. The plaintiff then became surety, not for the defendant, but for the principal in the bond. When it was paid it was money paid for the proper debt of the same party. It was in no just sense money paid for the defendant, because he was not a debtor upon the bond, to which the obligation of suretyship attached. He might be beneficially interested in the payment; but that is not sufficient to create a legal obligation to pay it. It makes no difference, that the goods were shipped on account and risk of the defendant, and so appeared upon the bill of lading and invoice produced at the custom-house. That did not, as between the parties to the custom-house bond, make the bond less the proper debt of the consignee. The consignee was still by law required to give the bond, and contract a personal obligation to pay the duties; and the surety was his security for the payment of the same. There was no privity between him and the defendant

in respect to that obligation. It is common learning, that, if *A* owe a debt to *B*, *C* cannot, by paying it without *A*'s request or co-operation, create an obligation on the part of *A* to repay it to him. And if *C* becomes surety for *D*, for the proper debt of *A*, *C* cannot, by the mere discharge of the debt, entitle himself to recover over against *A*. The reason, in both cases, is the same. There is no privity between the parties. Neither of these cases is so strong, in point of law, for the defendant, as the present case; for here, the consignees were primarily bound, as consignees, to give the bond, and pay the duties, as a personal debt, to the government, whoever might be ultimately interested to them.

This is the view of the case, which I should be disposed to take upon principle. But there are authorities directly in point. In *Tom vs. Goodrich*, (2 Johns. R. 213,) the goods were imported by a co-partnership at *New York*; one of the partners gave bonds at the custom-house, with the plaintiff as his surety; the surety paid the bonds, and now brought his suit to recover the amount against the surviving partners. Some objections arose from the form of the declaration. But the Court decided against the recovery, mainly upon the ground, that the debt, for which the plaintiff became surety, was the debt of the partner only, who gave the bond, and that a promise to indemnify, and to refund upon payment of the money, ought to be implied only against the partner giving the bond. Mr. Justice *Tompkins* there said, (and in that opinion my brother *Thompson* concurred,) that the law does not imply a promise by all persons, who may be benefitted in consequence of payment by a surety, but only by the person, whose debt is thereby discharged. Mr. Chief Justice *Kent* added, that it would be refining upon the doctrine of implied assumpsits, and going beyond every case, to consider the surety in a bond, as having by that act a remedy at law against other persons, for whom the principal in the bond may have acted as trustee. That case was stronger than the present; for there

the co-partnership were said to be the importers, though it does not appear, from the facts of the case, who were the consignees. I do not meddle with another proposition, stated in that case, that the receiving of the bond of one partner, for a debt of the firm, extinguished the debt of the *United States* against all the others. Upon that I beg to reserve any opinion until it arises directly in judgment.³ But I entirely concur in the general doctrine above stated. And it was confirmed by the Court in the most ample manner in the case subsequent of *Shuby vs. Champlin*, (4 Johns. R. 461.) There, the supercargo had given bonds at the custom-house, (being, I presume, consignee,) and the surety paid the money; and it was held, that his remedy was against the supercargo only, and not against the owner of the cargo.

There is another ingredient in this case, which would be decisive against the plaintiff; though I am disposed rather to settle the case upon the general principle already stated. It is this, that the Messrs. *Lewis* originally guarantied the debt, if the rum was sold (as it in fact was) upon credit. This they did before giving bonds at the custom-house. They accordingly, in their account current, treated the duties as a personal debt of their own, and charged the amount against the defendant, as a part payment of the net proceeds of the rum. At all events, they had a lien upon the goods and their proceeds for the amount; and having guarantied the payment, as between them and the defendant, the case is to be considered in the same way, as if they had actually received the proceeds before their failure. Under such circumstances, it is clear, that, if the Messrs. *Lewis* had actually paid the bonds, they could not recover the amount from the defendant. If so, what ground is there to suggest, that the surety stands upon a better right as against the defendant? If the Messrs. *Lewis*, as between themselves and the defendant, made

³ See 1 *Mason R.* 482, 505, 506.—*Attorney General vs. Stranyfuth*, *Bunb. R.* 97.—*United States vs. Astley*, 3 *Wash. Cir. R.* 508.—*Ex parte Hunter*, 1 *Alk. R.* 223, 227.

the duties their own debt, so as to be entitled to no recourse over against him, how can a surety upon their bond for that debt say, that it is still a subsisting debt in his favour? If extinguished between the consignees and the defendant, how can it be revived as to the surety? If the defendant had paid the amount to the consignees before the bond became due, where would there be any equity or law to support the claim of the surety?

But I wish to have it considered, that I put the decision upon the general principle, independent of the special circumstance of the guarantee.

Upon the whole, my opinion is, that the defendant is, upon the facts, entitled to judgment in his favour.



UNITED STATES vs. DANIEL C. GARDNER AND OTHERS.

If the crew combine together to refuse to do duty, and actually refuse until the master complies with some improper request on their part, it is an endeavour to make a revolt within the Crimes Act of 1790, ch. 9, [36,] § 12.

INDICTMENT for an endeavour to make a revolt on board the ship *Ganges*, in *Boston* harbour, founded on the Crimes Act of 1790, ch. 9, [36,] § 12. Plea, not guilty.

At the trial it appeared, that the seamen had signed the shipping articles, and the ship was already for sea, and that the master directed the pilot to get the vessel under weigh for sea for the voyage. The whole crew (among whom were the defendants) utterly refused to obey the orders of the master, or to get the ship under weigh, unless the master would agree, that they should have a day watch below, in the forenoon, during the whole voyage. This the master refused to do, as being an unreasonable request; and it was proved by witnesses, that it was im-

United States vs. Gardner.

proper and injurious, and unknown as a regulation on board of ships. The defendants and the rest of the crew then separated themselves from the officers, and collected together by the fore-castle, and steadily refused all obedience to the orders given, and acted together in concert. Application then was made for a warrant to arrest them, and they were taken on shore under it, and upon a hearing before the District Judge, he explained the law to the seamen, and urged them to go on board again, and the owners agreed, if they would go on board and perform duty, this offence should be forgiven and forgotten. The defendants refused, and were then committed for trial.

Dunlap for the *United States*, and *S. D. Parker* for the defendants, submitted the case to the Court and jury upon these facts.

STORY J., in summing up the case, said, If the jury believe the facts to be as testified by the witnesses, the Court are of opinion, that there was an endeavour to commit a revolt. There was a common combination by the crew, for a common and illegal object, and they refused obedience to the lawful orders of the master, and incited each other to persist in that disobedience, so as to overthrow his authority and command on board of the ship. We have already decided this point in the case of *United States vs. Harris and others*, which has just been tried.

Verdict guilty, and sentence accordingly.

UNITED STATES vs. GEORGE BARKER AND OTHERS.

If the crew combine together not to do duty, it is an endeavour to make a revolt within the Crimes Act of 1790, ch. 9, [36,] § 12, although no orders are actually given afterwards.

If the shipping articles are, to the *final* port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port until the whole is discharged.

Port of destination and port of discharge are not equivalent words. Some cargo must be unladen to make the port of destination the port of discharge, or an actual termination of the voyage there.

INDICTMENT for an endeavour to make a revolt on board the brig *Apthorp*, at *Nantasket Roads* in *Boston* harbour. Plea, not guilty.

At the trial it appeared, that *George Barker* was the mate of the ship, and the other defendants were of the crew. They had signed the shipping articles in *Charleston, South Carolina*, for a voyage "to two or three ports of discharge and lading in *Europe*, and back to a *final* port of discharge in the *United States*." *Michael C. Bowden* was master for the voyage. The vessel went to her ports in *Europe*, took in a cargo of salt at *St. Ubes*, and came back to *Boston* as her port of destination. Before her arrival the owners in *Boston* had directed a letter to the master, ordering him not to come into *Boston* harbour, but to proceed to *Alexandria* in the *District of Columbia*, and there land his cargo. The letter was dated several days before the arrival of the brig, and was delivered to a pilot, who delivered it to the master, while the brig was at sea, three miles out beyond the *Boston* light-house. The master was at this time quite ill, having spit blood ; and he concluded to go into *Nantasket Roads* and procure, with the consent of the owners, a new master for the voyage to *Alexandria*. He accordingly anchored the brig in *Nantasket Roads*, went on shore, and with the consent of the owners he was discharged, and a new master appointed. He

came on board with the new master, explained to the mate and crew the situation of the brig and his orders, and showed them, that, by their shipping paper, they were bound to go the voyage to *Alexandria*, as the voyage was to the *final* port of discharge. The mate at first expressed himself doubtingly whether to go or not, but finally refused; and the crew, notwithstanding every solicitation, refused to go the voyage. No actual orders were given to go to sea, although the brig was then ready, and the new master had all his clothes and papers and trunk on board. There was no actual proof, that the mate acted in concert with the crew, or that the latter acted by a previous combination. Some of them pleaded ill health, and were discharged; and new hands were shipped in their stead. The others separated themselves and remained together, until they were removed on shore under a warrant, and when brought before a magistrate they all refused to go on board again, though he explained to them their obligations. A new crew was then shipped, and the brig went to *Alexandria* with her cargo.

S. D. Parker, for the defendants, argued, that there was no crime in the transaction, there being no intention to do wrong, and the offence resulting from an incorrect understanding of the law as to what was meant by a "final port of discharge." They knew that the vessel was bound from *St. Ubes* to *Boston*, which port they entered, and supposed that port must be the end of the voyage, and it appeared, that one man, shipping for *Boston* only, without signing the papers, was here discharged. *Mr. Parker* contended also, that there was no offence, because there was no disobedience of an actual command, it appearing from the evidence, that the question was put to them hypothetically, as, if you are ordered, &c. by the new captain, will you obey? The answer was in the negative; but as no such command was given, there was no disobedience. The government had proved no combination among the men to resist a lawful command, it appearing that each man, separately questioned, answered for him-

self, declining to proceed on the new voyage, but obedient to all *orders*, and uniformly civil in his replies. It appeared, that two men were here discharged, being unwell, and that some of the others had families, and all friends, in this neighbourhood. If discharged at *Alexandria*, they would be at the expense of returning to this port.

Dunlap (District Attorney) cited 1 *Black*. 392 ; 1 *Strange*, 144 ; showing, that the actual fact of a conspiracy was not necessary to be proved to constitute a conspiracy, which might be inferred from circumstances. He argued, that a similar determination, expressed by all the men, and persisted in by them, amounted to a conspiracy, which was of an illegal character and came within the statute. That the crew had no right to infer, that *Boston* would be the final port of discharge, from the fact, that the vessel cleared at her last port for *Boston*, but that the owners possessed the right to order a vessel to any port whatever ; that from the insertion of the words *final port of discharge*, the men must have considered it not only possible, but exceedingly probable, that the vessel would proceed to some other port. That the men did not refuse to go the voyage so much as to obey the new master, and that the form of an order was unnecessary after a positive refusal to obey such order if given. From the nature of the circumstances there must have been a combination among the men, which was also evident from the result.

STORY J., in summing up the evidence, said, As to the first point, we are of opinion, that the shipping articles extended to the voyage to *Alexandria*. The fact, that the destination was, by the original instructions of the owner, to *Boston*, does not necessarily make it the port of discharge. Port of destination and port of discharge are not equivalent phrases. To constitute a port of destination a port of discharge, some goods must be unladen there, or some act done to terminate the voyage there. But, here, the words are "*final port of discharge*," so that the

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owner had a right to order the ship from port to port, until there was a final discharge of the whole cargo. We think, that the owner before the arrival of the brig and after, had a right to elect another port for the discharge of the cargo ; and here he was guilty of no delay, and the arrival at *Boston* was against his orders. Under such circumstances there is no pretence to say, that *Boston* was any port of discharge at all, much less a final port of discharge. This construction is, as far as we know, the same, which has been uniformly put upon these words, both in shipping articles and policies of insurance.

As to the other point, we do not think, that actual disobedience to some order given is necessary to constitute the offence of an endeavour to make a revolt. If the crew have combined together to disobey orders and to do no duty, the offence is complete by such combination, although no orders have been subsequently given. But a simple refusal, by one or more, to do duty, does not amount to the offence, unless it is done by a common combination, or to effect a common purpose. In short, the parties must act together, and with the intention of mutual encouragement and support.

Verdict, not guilty.

ADAM LODGE vs. ADAM LODGE AND TRUSTEES.

Under the statute of *Massachusetts* of 1823, ch. 242, giving relief against fraud to second attaching creditors, it is not necessary, that the second attachment should be returnable to the same term of the Court as the first attachment.

Quere, if the plaintiff must, in all cases under that act, sign and make oath to his petition, to be admitted to defend against the first attachment, or if it may be done, if he is abroad, by his agent.

THIS was an action of assumpsit. No appearance having been entered for the defendant, *Hubbard* for *William Brown*, an alien and resident abroad, and a creditor of the defendant, made ap-

plication by petition to be permitted to defend the suit, under the *Massachusetts* statute of the 21st of February, 1824, [1823, ch. 142.] The petition stated, that the petitioner had commenced a suit returnable to the next term of this Court, and that the present suit was, in the belief of the petitioner, fraudulent, and the petition was verified on oath by his agent.

Sumner, for the plaintiff, resisted the application, contending, that the case was not within the statute, the writ not being returnable to this term. He also contended, that the petitioner only could file the petition, and make personal oath thereto, and that it was not competent for an agent to file it or make the oath.

STORY J. The statute of 1823, ch. 142, entitled an act to prevent fraud in the attachment of real or personal estate, provides, "that in all cases where the same estate, real or personal, has been attached on mesne process in two or more suits, that the plaintiff or plaintiffs in any suit, after that in which the first attachment shall have been made, may petition the Court where-to the writ shall be returnable, on which such first attachment shall have been made at the return term of such Court, or at the next term thereof, if such suit shall still be therein pending, and not afterwards, for leave to defend against such first suit, in like manner as the party therein sued could or might have done."

The question is, whether it be indispensable to entitle a second attaching creditor to maintain such a petition, that the writ in his suit should be returnable to the same term of the Court, as that of the first attachment. This is a remedial act, and if the words of it admit fairly of two interpretations, one of which will enlarge, and the other restrict, its beneficial operation, it is the duty of the Court to adopt the former. But we do not think there is any ambiguity in the act. Jurisdiction is given to the Court, to which the first attachment is returnable, at the return term or the text term after to entertain the petition. But nothing is said as to the return term of the second attachment.

All, that is required, is, that there should be a second attachment. But it is said, that there cannot be any proof of the second attachment, except by the return of the writ to the Court, to which it is returnable, and then it is record proof; for until then there is no pendency of the suit. The argument is not well founded. For certain purposes a suit is, or may be, deemed pending, only when it is entered of record in the proper Court. But it is far from being universally true, that it cannot be considered as pending before the return term for any purposes, or that the writ may not be proved to exist as a virtual authority for an attachment before that period. When a writ is returned, the proper proof comes from the record. When it is not yet returned, and cannot be, the existence of the writ, and its proper service may be proved by the production of the writ itself. What would be the situation of officers, if such proof were not admissible? This Court sits only twice a year. The marshal may arrest the body, or make an attachment of property, and according to the doctrine contended for, he would, if sued for such act by any party before the return term, be unable to defend himself upon trial, however lawful his act might be. The law involves no such inconvenience. An attachment, when it has not yet become matter of record, is still an attachment, and may be proved by any proper evidence *in pais* for all purposes, and by all parties having an interest therein.

It is unnecessary to decide the second point, because, if the argument be well founded, it furnishes a good ground, why, in this case, as the plaintiff is an alien and abroad, that a continuance should be allowed to enable him personally to sign the petition, and take the oath according to the second section of the statute.

And we are accordingly of opinion, that the case be continued for this purpose, not meaning, however, to express any opinion as to the validity of the objection.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1829, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

MARTHA HOWELL vs. HENRY SAULE AND OTHERS.

A conveyed to *B*, by deed, a certain piece of land by specific boundaries, and then added, "it being the same land given by my honoured mother to him the said *B*, by her last will and testament, said land containing about five acres."

The devise in the will was of "a piece of plain land, of about four or five acres, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch."

It was held, that the latter clause did not control the specific boundaries in the deed, even supposing the will would admit of narrower limits, or was of doubtful construction.

EJECTMENT. Plea, the general issue. Both parties claimed the estate in question, under *Martha Brown*, wife of *Elisha Brown*. On the 1st of July, 1760, she, being then a *feme covert*, made her will, which upon her death was proved in the Probate Court in October, 1765; and among other items, she made the following devise. "Item, I give and devise to my son, *Jeremiah Brown*, two small lots, part of the aforesaid estate, lying southwestwardly from the southwest end of the back street of said *Charlestown* [part of *Providence*], number the first and second lots on said map [a map before referred to in her will]; also a piece of plain land, of about four or five acres, parcel of said

estate, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch, [which] is a boundary line of lands assigned for dower to the widow Sarah Smith, to be and remain to him and his heirs for ever." Her will being, by reason of her coverture, invalid to pass real estate, the devise became void; and the whole estate descended, according to the then law of *Rhode Island*, to her eldest son, *John Brown*, as her heir at law. *John Brown*, on the 19th of January, 1768, with a view, (as it should seem,) to carry into effect his mother's will in this respect, made a deed to his brother, *Jeremiah Brown*, and thereby granted to him "one certain piece or parcel of land, lying and being situated in *Providence* aforesaid, in the southwesterly part of a place called *Charlestown*, being part of the mill estate, joining easterly on *Daniel Smith's* land, southerly on *Robert Gibbs's* land, westerly on *Samuel Thurber's* land, northerly on an old ditch on my own land; it being the same land given to him, the said *Jeremiah Brown*, by my honoured mother, *Martha Brown*, deceased, in and by her last will and testament, said land containing about five acres."

The old map referred to in the will bears date in 1754, and was produced and admitted at the trial, without objection. It contains a series of lots on the eastern side of the land, numbered from No. 1 to 19, &c., beginning at the southern side, and proceeding northerly.

The action was for a parcel of land called No. 7, in the lots laid off on the map, and the plaintiff claimed title to it under *John Brown*, as not having passed by his deed in 1768. The defendants claimed title to the premises under *Jeremiah Brown*, as having passed to him by the same deed. The whole controversy turned upon the true construction of the terms of that deed, as connected with the will of *Martha Brown*.

The material grounds contended for in argument, are stated in the opinion of the Court; and it is not, therefore, thought necessary to restate them. The case was argued by *R. W. Greene* for the plaintiff, and by *Pratt* for the defendants.

Howell vs. Sauls.

STORY J. It is admitted, that the boundaries stated in the deed of 1768, from *John Brown* to his brother *Jeremiah*, include the premises now demanded, if we stop at the clause in that deed, which refers to his mother's will. But it is contended by the demandant, that these boundaries are controlled by this last clause, so as to include such land only, as the mother devised to *Jeremiah*. The whole piece of plain land contains about *five* acres; but cut down, as the demandant contends for, it will include only *three and one half* acres.

Let us, then, first consider the terms of the devise made by the mother. After devising two lots, she proceeds to devise a piece of "plain land, of about *four* or *five* acres, parcel of said estate, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch," &c. The description is obviously incomplete, giving, correctly enough, the general direction in which the land lies, and bounding it only on the northwesterly side by a ditch, the same boundary, which is given in the deed. The only additional circumstance stated in the will, to help the generality of this description, and to enable us to ascertain the extent of the land devised, is the statement of the number of acres it contains. It is stated to contain "about four or five acres." So that if we adopt the construction of the demandant, the devisee takes less than the testatrix supposed; if we follow that of the tenant, he takes no more than the testatrix supposed. In this respect, then, the deed comports with the apparent intent of the will.

But suppose the quantity intended to pass by the will were doubtful, the parties had a right to give it such an interpretation as in their judgment best comported with the mother's intentions. They adopted the interpretation, which was most favourable to the devisee. If, as has been supposed at the bar, the grantor intended to carry into effect the object of his mother, his deed has reduced to certainty, that which the argument supposes before to have been left somewhat in uncertainty. It was undoubtedly

competent for the grantor to adopt such a liberal construction. In the interpretation of deeds the general rule is, to construe the uncertain, as nearly as possible, in conformity to that, which is certain. If the Court can find out the general intent, it will carry that into effect, notwithstanding any repugnancy in another part of the description. *A fortiori*, the Court will give effect to that, which is certain in description, rather than leave the deed inoperative, because there are other references in it, obscure, imperfect, or inexact.

But in the present case, we do not think, that the deed furnishes any real grounds for debate. The grantor has in his deed stated with certainty the exact boundaries and quantity of the land, which he conveys to his brother. He then adds, that it is the same land devised by his mother. This is not a clause controlling the legal effect of the preceding description, or intended to narrow its purport. It is a mere explanatory clause, expressive of his view, that the land is the same, which was devised by his mother. He does not say, that he grants what was devised by her, and *no more*; but he grants a certain piece of land, containing five acres, by specific boundaries, and then adds a statement of what he supposes to be a fact. Suppose none of the land had been devised in his mother's will; would the grant have been utterly void? Certainly not.

We think there is no repugnancy between the will and the deed; and that in the most favourable view for the demandant, the parties have put a construction upon the terms of the will, that it included the five acres specified in the boundaries of the deed. But if this were not sufficient, still the deed operated as a grant of the land included in the specific boundaries, and the subsequent clause ought not to control or narrow it.

It is not immaterial to add, that the subsequent occupation and claims by the respective claimants under the grantor and grantee in that deed have been, as far as the written evidence goes, in perfect conformity with this construction of the terms of the deed.

The plaintiff discontinued her suit.

Smith vs. Arnold.

DUTEE SMITH, ADMINISTRATOR OF RUSSELL ALDRIDGE,
vs.
JOHN ARNOLD.

Where a sale was made by an administrator, at public auction, of the real estate of his intestate, under a license of the proper Court, to pay debts, and he acted as auctioneer at the sale; it was *held*, that a memorandum by him of the sale at the time, was not binding on the purchaser, who bid at the sale, and that he was not his agent so as to make the sale a valid contract under the statute of frauds of *Rhode Island*.

No memorandum under the statute of frauds is sufficient, unless it state the price and material terms of the contract for the sale of lands.

ASSUMPSIT. The declaration was for the price of a certain farm sold by the plaintiff, as administrator of *Russell Aldridge*, to the defendant, the defendant refusing to complete the purchase. Plea, non-assumpsit.

At the trial it appeared, that the plaintiff was duly licensed as administrator, by the Supreme Court of *Rhode Island*, to sell the land in controversy; and that it was duly advertised for sale, at public auction, in May, 1824. The administrator acted as auctioneer at the sale, (administrators being exempted from the prohibitions of the statute of *Rhode Island* as to public sales,) and the defendant being the highest bidder at the sale, the premises were struck off to him. The advertisement was of *all the right and title* of the intestate in the premises. The administrator wrote down, at the time of the sale, upon a paper containing the conditions of the sale, the following memorandum. "The home farm of said *Aldrich*, called 140 acres more or less, said *Aldrich's* title in the same struck off to *John Arnold*, highest bidder, for \$1705,50." The memorandum was without any signature. But below it there was another memorandum signed by the administrator verifying it, which appeared to have been made at a different time and with different ink. Some time after the sale in September, 1824, the Court of Probate, upon the appli-

cation of the widow of the intestate, set off her dower in his estate, and assigned a considerable part of the premises for that purpose. The defendant, in October, 1824, prayed an appeal to the Supreme Court from the decree for dower, and in his petition alleged, that he was "a creditor to said *R. Aldrich's* estate, and a purchaser at auction of the said tract or farm." The condition of his bond, given on the granting of the appeal, stated, that he was *interested* in the said estate.

The memorandum and a record copy of the petition and bond were offered as a sufficient memorandum, within the statute of frauds, to charge the defendant as purchaser.

Whipple, for the defendant, objected to the evidence as inadmissible, and argued his objection at large, and cited 2 *Camp. R.* 203; 3 *Burr.* 1921; 1 *W. Bl.* 509; 2 *Taunt.* 38; 4 *Taunt.* 409; 4 *Johns. Ch. R.* 659; 14 *Johns. R.* 484; 3 *Vez. & Beam.* 57; 1 *Jac. & Walk.* 350; 4 *Johns. Ch. R.* 663, 669; 9 *Vez.* 251.

On the point, as to the inadmissibility of the evidence of the petition and bond, as evidence of the contract *per se*, he cited *Preced. Ch.* 560; 2 *Sch. & Lefr.* 22; 1 *Atk.* 12; 1 *Brown Parl. Cas.* 345; 1 *Vez. jr.* 326; 10 *Mass. R.* 230; 15 *Vez.* 516; 1 *H. & Munf.* 166; 2 *Desaussure R.* 188; 1 *Johns. Ch. R.* 273.

Tillinghast and *Searle* argued at large, *è contra*, and cited on the point, that the memorandum was sufficient, 7 *Vez.* 341; 9 *Vez.* 234; 13 *Vez.* 341; 2 *Johns. R.* 248; 8 *Johns. R.* 520.

They also contended, that this was a judicial sale, and so out of the statute of frauds; and cited 12 *Vez.* 471.

The arguments are not given at large, as they are fully considered in the opinion of the Court.

STORY J. delivered the opinion of the Court. The question here is, whether there is a sufficient memorandum, within the statute of frauds of *Rhode Island*, (*Digest of 1822, p. 366,*) to

bind the defendant as purchaser of the land. The statute is the same in substance with the *English* statute of frauds of 29 *Car. 2*, *ch.* 3, § 4. The words are, "No action shall be brought, whereby to charge, &c. &c. any person upon any contract for the sale of lands, &c. &c. unless the promise or agreement, upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person, by him thereto lawfully authorized."

I will first consider, whether the petition and bond in the Court of Probate contain any sufficient proof of the contract now sued on; or contain any reference to the memorandum made by the administrator, acting as auctioneer at the sale, so as to amount to an adoption or ratification of the memorandum. Now, taking the probate proceedings *per se*, it is very clear, that they contain no sufficient statement of the contract to be binding on the party. The language of the petition is, that the petitioner is a "creditor and *purchaser at auction* of the farm." It is not said of whom he purchased, at what sale, or at what time; and the Court cannot intend, that it must necessarily refer to the sale by the administrator. But what is fatal is, that it contains no statement of any price or consideration of the purchase; and no memorandum is sufficient within the statute, which does not contain in substance the essential terms of the contract. How can that be said to be a memorandum of a contract, which is wholly silent as to the consideration and terms of the contract? which merely states, that there was a contract or purchase; but leaves all in darkness as to the nature and extent of it? The probate papers, therefore, as a memorandum, may be entirely laid aside. Then, do they contain any certain reference to the memorandum of the administrator, so as to admit and adopt it? There is not a word of reference to any memorandum whatsoever. • It is not even said, that the purchase was of the administrator; and unless there were some certain reference so clear as to ad-

mit of no doubt, there is no pretence to say, that the Court is at liberty to incorporate the memorandum into, and make it a part of, the petition, as the written admission of the defendant. We may, then, lay aside any further consideration of these proceedings. They stand alone, and are of themselves no proof of any contract binding on the defendant.

Then is the memorandum of the administrator sufficient? The memorandum is at the bottom of the conditions of sale, and so far as respects the defendant, it is in the following words. "Struck off to *John Arnold*, highest bidder, for \$1705,50." There is now found at the bottom of the paper a signature of the administrator's name; but it is almost certain, that it was not made at the time when the memorandum was written, for it is in a very different ink, and apparently of more recent date. So that the memorandum is not brought within the terms of the statute. It is not signed by the party to be charged therewith, or by his agent thereunto lawfully authorized.

But the important question is, whether, under the circumstances of the present case, the administrator can be considered as the agent of the purchaser, authorized by him to make and sign the memorandum. If he can, then the defendant is bound, for the memorandum sufficiently sets forth the terms of the contract. After much fluctuation and doubt, it has at last been settled in *England*, that an auctioneer is to be deemed the agent of both parties in respect to the sale, and authorized to make a memorandum for both. Lord *Mansfield*, in *Simon vs. Motivos*, (3 *Burr. R.* 1921,) began that doctrine; and it has, after very great hesitation, been followed. It appears to me, speaking with all due respect, to have done much to destroy the salutary operation of the statute of frauds. By the common law, if an agent is to execute a deed for his principal, his authority must be of as high a nature. It must be by deed. By analogy it would have seemed convenient, if not indispensable, to have held, that where the statute, to prevent frauds and perjuries, required a contract

to be in writing, if executed by an agent, his authority should be in writing also. That the auctioneer is agent of the seller is clear ; that he is also agent of the buyer is not so very clear ; and is a conclusion founded on somewhat artificial reasoning. But the doctrine is now established ; and the best reason in support of it is, that he is deemed a disinterested person, having no motive to mis-state the bargain, and enjoying equally the confidence of both parties. The agency is presumed to be given to him on this account by the purchasers, trusting to his integrity and disinterestedness. But the case is very different, where the auctioneer is the vendor, and is himself the very party in interest, with whom the contract is made. There can be no reasonable presumption from the mere act of bidding, that the purchaser means to trust the other party with settling, by his own memorandum, the whole terms of the contract. It would be a very extraordinary position, at war with the ordinary care and caution of men, to put into the hands of the other party the unlimited power to settle all the terms of an important contract by his own memorandum. And this would be the result of the doctrine contended for. For if the mere act of bidding, being proved by parol, would be sufficient to create a virtual agency for the bidder, then the party would be bound, though he never saw the memorandum ; and when the memorandum was once reduced to writing, no parol evidence could at law be admissible to show, that the terms were mistaken or varied ; for the memorandum would be the proper evidence of the contract, though made by the very party in interest. It is said, that here the administrator is not the party in interest ; and that he has a mere power or license to sell. But he is the party, who alone is competent to make the contract. The price must be paid to him ; and *non constat*, to what extent, as administrator, he may have an interest in the proceeds, either as creditor, or for services. He stands in the same situation as a trustee of an estate, selling for the use of his *cestui que trust*. He could not be a witness to prove the con-

tract. And yet, upon the doctrine now asserted, his memorandum is better than any testimony. In a legal point of view he is the real party to the contract, and is alone authorized to sue upon it. And whether he has a beneficial interest in it, or not, is immaterial. He is the legal party in interest in the price and performance of the contract.

The case, then, is not distinguishable from that of any other vendor, who acts as auctioneer. If there were no authority upon the subject, we should say, upon principle, that a vendor was not to be presumed to be the agent of the purchaser for the purpose of signing the contract for him. That it would be a presumption against common sense to suppose, that the party could act both as buyer and seller at the same time, and that the purchaser meant to surrender himself into the hands of a party in interest. If there were an *express* authority given for such a purpose, that might be another thing. But it ought not to be presumed from so equivocal an act as bidding at a public sale, and having the property struck off at the bid. There are cases, where courts of law have interposed limitations upon the construction of the statute, which are not found in its words. It is, for instance, decided, that the memorandum of the auctioneer, to bind the purchaser, must be *contemporaneous* with the sale. It cannot be made afterwards. Now, the statute does not say, that the memorandum in writing shall be contemporaneous with the sale. But the Courts, upon principles of just policy, have bound up the words by this restriction, in order to prevent men from being ensnared by contracts subsequently reduced to writing by agents.¹ The same reasoning applies to the present case, and with far greater force.

But there is an authority directly in point, and even stronger, than the case before the Court. It is *Wright vs. Dannah*, (2 *Camp. R.* 203.) There, the vendor reduced the contract to writing, and showed it to the vendee, who corrected it and ap-

¹ See 13 *Vez.* 456.

proved it. But it was held by Lord *Ellenborough*, that the memorandum was not sufficient within the statute of frauds. On that occasion he said, "The agent must be some third party, and could not be the other contracting party." Now there, the very paper was assented to by the party, after it had been read; but the Court thought it dangerous to allow the doctrine, that the mere assent of the vendee to the contract, as drawn up by the vendor, should be deemed by implication to make him an agent to bind the vendee by the memorandum. It was quite consistent with the facts, that he should be satisfied, that it was truly stated, and yet that he should not adopt it as his own act, or the act of his agent to bind him.

But it is said, that this is the case of a judicial sale, and such sales have been held not to be within the statute of frauds. The cases alluded to are sales of a very different sort from that before the Court. In sales directed by the Court of Chancery, the whole business is transacted by a public officer under the guidance and superintendence of the Court itself. Even after the sale is made, it is not final, until a report is made to the Court, and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the Court, and, if any mistake has occurred, may have it corrected. He, therefore, becomes a party in interest; and may represent and defend his own interests; and if he acquiesces in the report, he is deemed to adopt it, and is bound by the decree of the Court confirming the sale. He may be compelled, by process of the Court, to comply with the terms of the contract. So that the whole proceedings, from the beginning to the end, are under the guidance and direction of the Court; and the case does not fall within the mischiefs supposed by the statute of frauds. In the case of an administrator, the authority to sell is, indeed, granted by a court of law. But the Court, when it has once authorized the administrator to sell, is *functus officio*. The pro-

Smith vs. Arnold.

ceedings of the administrator never come before the Court for examination or confirmation. They are mere matters *in pais*, over which the Court has no control. The administrator is merely accountable to the Court of Probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale is not matter, into which there is any inquiry by the court granting the license, or by the Court of Probate having jurisdiction over the administration of the estate. So that the present case is not a judicial sale in any just sense ; but it is the execution of a ministerial authority. The sale is not the act of the court, but of the administrator.

For these reasons we are of opinion, that the evidence is inadmissible.

Plaintiff discontinued.

ALONZO BROWN vs. GEORGE CURTIS.

If a company by the articles of partnership do their business by agents, and among other officers by a treasurer, and one of the partners is appointed treasurer, and afterwards fails, owing the partnership, as treasurer, the company have a right to claim payment of the debt out of the *separate* estate of such partner in the hands of his assignees. And if the debt is transferred, the same right attaches to the holder.

BILL in equity. The facts were, that in October, 1827, *John A. Wadsworth*, *John Welder*, and *Joshua B. Wood*, entered into a copartnership for making steam-engines, under the firm of the *Providence Steam-Engine Manufacturing Company*. The business of the partnership was managed by *Wadsworth*, as agent of the company, and *Wood* carried on during the same time the business of a broker in *Providence*, receiving deposits of money, &c. The articles of partnership provided for the appointment of a general agent to manage the concern, receive

monies, and pay the same to the treasurer, make payments, &c. &c. They also provided for the appointment of a treasurer, who was to receive the monies of the company, and to whom the partners were to pay the instalments upon the capital stock. *Wood* failed in May, 1828, having then in his possession, as treasurer, a balance due to the company, of \$1190.98, and having made an assignment of all his estate for the benefit of his creditors to the defendant, *Curtis*. The company failed in August, 1828, and all their property was, with the consent of the defendant, assigned to Messrs. *Stanford Newell* and *Cyrus Dyer*, for the benefit of their creditors. In March, 1829, Messrs. *Newell* and *Dyer* assigned the debt due from *Wood* to the company to the plaintiff, for the consideration of \$500. The property of the company is insufficient to pay their debts, and the private property of the partners is insufficient to pay their private debts. The object of the bill is, to obtain payment of, or a dividend upon, the debt, out of the separate estate of *Wood*, in possession of the defendant, his assignee, the assignment being, after certain preferred debts were discharged, for the equal payment of all other creditors rateably.

The defendant by his answer admitted all the facts stated in the bill, except that the plaintiff was a purchaser for a valuable consideration, of which he required proof; and he denied, that the plaintiff, if a purchaser, was entitled to any dividend or payment out of the separate property of *Wood*.

The cause was heard at this term upon the bill, answer, and depositions in the case. It was argued by *R. W. Greene* for the plaintiff, and by *Searle* for the defendant.

For the plaintiff were cited, 1 *Atk.* 227, and 11 *Vez.* 413.

STORY J. The fact, that there has been a good assignment of the debt to the plaintiff, is sufficiently made out by the evidence. The question then is, whether the plaintiff is entitled to the relief he prays. It is said, that he is not, against the separate creditors

of *Wood*, entitled to a dividend out of the separate estate of *Wood*, because he owes the money as partner, and not as a separate concern. Now, upon that point the doctrine asserted in the cases at the bar is, that partnership debts are properly payable out of the partnership property, and separate debts out of the separate property, and until the creditors are satisfied, who have claims on the separate estate, partnership creditors shall not be admitted to touch it. Lord *Hardwicke*, indeed, in *Ex parte Hunter*, (1 *Atk.* 223, 227,) held a broader doctrine in respect to a debt due for advances from the firm to one of the partners, and thought it ought to be paid out of the partnership funds, *pari passu*, with the other debts due to the creditors of the firm. It is now unnecessary to say, whether there is more good sense in that, than in the later doctrine of Lord *Thurlow*, which has been acted upon by Lord *Eldon*, that all the joint creditors shall first be paid. And it must be taken into consideration, that all these cases arose in bankruptcy, and were in the exercise of the Chancellor's authority in bankruptcy; and the objection is said to have been, that the admission of the debt would require an account to be taken of all the partnership concerns. That might be a good reason for declining the interference in a petition in bankruptcy; but it does not follow, that upon general principles the same rule ought to apply to a bill in equity, especially where there is a general assignment of the party to pay all his debts rateably, and there is, technically speaking, no insolvent act or legal bankruptcy to affect the case.

But waving all consideration of this point, we are of opinion, that here the money was not drawn out of the partnership funds, as partner. *Wood* received, and held it in his official capacity, as treasurer, and not as partner. It was delivered to him by the agent of the company under the articles; and the agent drew for it from time to time, as the concerns of the company required. *Wood*, then, held it, as a stranger or banker would hold it, not for his own account, as partner, but for the company, and by receiv-

ing it, he contracted in equity a separate debt to the company, as treasurer, and not as partner ; so that it falls within the authority of *Ex parte St. Barbe*, 11 *Vez.* 413.¹

A decree must therefore be entered for the plaintiff. The parties, however, admit, that a final decree cannot now be entered ; and, unless they agree, let it be referred to a master, to ascertain the fund in the hands of the defendant, and the rateable proportion due to the plaintiff.

Decree accordingly.

¹ See, also, 1 *Hovenden's Supplement to Vezey*, p. 650, note 6.—*Ex parte Hargreaves*, 1 *Cox R.* 440.—*Ex parte Harris*, 2 *V. & Beam. R.* 212.—*Ex parte Young*, 3 *V. & B.* 31, 34.—1 *Cooke's Bank. Law*, ch. 13.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM 1830, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

JOHNSON AND ANOTHER, IN ERROR, vs. UNITED STATES.

If a collector of the customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared upon as a subsisting deed ; for the cancellation is, in such a case, a flagrant violation of duty.

A collector of the customs is not at liberty to receive any thing but money of the *United States*, or foreign gold or silver coin made current, in payment of duties.—If he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged ; *a fortiori*, it is not discharged by the receipt of a memorandum check.

A collector, like other public officers, cannot bind the *United States* by any acts beyond, or contrary to, the authority given him by the laws.

The receipt of a collector acknowledging payment is *prima facie* evidence, but not conclusive, of the fact of payment.

Upon a demurrer to evidence, the party demurring is bound to admit all the facts, which the evidence on the other side conduces to prove ; and the Court on such a demurrer will infer them in his favour.

Quære, whether a collector is not to all intents *functus officio*, as soon as a removal takes place by the appointment of another person in his stead ?

The government is not ordinarily bound by an estoppel.

THIS was a writ of error to the District Court of *Maine*, The original action was debt, brought by the *United States* upon a bond given for the payment of duties in the usual form. The declaration alleged, that the defendants, on the 8th of September

1828, by their writing obligatory of that date, sealed with their seals, *which having been lost and destroyed cannot be produced here in Court*, bound themselves unto the *United States*, in the sum of ten thousand dollars, to be paid by the defendants on demand ; yet, &c. The defendants pleaded, 1. *Non est factum* ; 2. That they bring into Court here the said supposed writing obligatory, mentioned in the plaintiffs' declaration, and pray that the same may be read and enrolled here in Court ; and the said supposed writing obligatory, and the condition thereof, are read and enrolled here in Court in these words, *viz.* [setting forth the bond and condition verbatim, the bond having still on its face the seals of the parties, but with a cancellation or cross over the names as follows, X] ; which being read and heard, they plead *actio non*, &c., averring a payment of the amount of the duties on the 12th of May 1829, (the condition of the bond being for payment of the duties *on or before the 8th day of June 1829*,) to the collector of the customs for the district of *Bath*, for the time being, and that the sum so paid "was then and there accepted by the said collector, as full and complete performance of said condition ; and said collector delivered up said writing obligatory, to said defendants, cancelled and receipted according to the condition of the aforesaid writing obligatory ; and this they are ready to verify ; wherefore, &c."

The *United States* replied, that the defendants did not pay said sum to the collector of the customs for the district of *Bath*, in manner and form, &c., offering an issue to the country, which was joined by the defendants.

At the trial of these issues, there was a demurrer to evidence on behalf of the *United States*, and a joinder in demurrer by the defendants, upon which the District Judge gave a judgment in favour of the *United States* ; and the present writ of error was brought to that judgment.

The evidence, as stated in the demurrer to evidence, was as follows :

“The plaintiffs sue the defendants in a plea of debt, and declare on a bond, dated September the eighth, in the year of our Lord one thousand eight hundred and twenty eight, for ten thousand dollars, as lost and destroyed, as will be made to appear by reference thereto. And the defendants appear by their attorneys, and plead first, *non est factum*, and issue is joined thereon; and secondly, payment of the amount due on said bond, and the plaintiffs reply to said second plea, denying the payment, and issue is thereon joined; all which pleadings are at large to be considered as herein set forth; and thereupon a jury is duly empanelled to try the said issues, and the cause is opened to the court and jury by reading the pleadings; and the plaintiffs to maintain the issues on their part, called upon *John B. Swanton*, who being duly sworn, testified as follows:”

“I, *John B. Swanton*, on oath declare and say, that I do not recollect of delivering a bond dated September 8, 1828, payable June 8, 1829, signed by *Johnson Williams* and others, to *William King*, the present collector at *Bath*; if not delivered to him, it was delivered to Mr. *Williams*, who paid it to me or my son; but my impression is, that the bond he paid me fell due in July. It was either handed to Mr. *King* or Mr. *Williams*. There has been some difference in the communications between the comptroller, Mr. *King*, and myself, in regard to bonds, and I cannot decide from the inspection of the authenticated paper exhibited to me, whether the bond inquired for is contained in the original account or not. I delivered a duty bond or bonds to the defendants, the last day of payment of which had not arrived, on the fifteenth day of May last. I think there was one or two. I took a check or checks on the *Lincoln Bank* in payment of the same. I cannot be positive whether I was in the office that day when the checks were given, or whether my son received them; nor whether they were signed by *J. Williams*, or *J. Williams & Co.*; whether they were memorandum checks or not, I cannot say. I considered memorandum checks best, as the cashier

would not be likely to pay them to a third person ; I considered those checks perfectly good. My bondsmen to the *United States* became alarmed, and one of them called on me and I offered to give him security, either in money or notes. The checks taken in this case were sent to Mr. *Williams*, who sent me the notes of *J. Williams & Co.* for the amount of the checks, which I delivered to Mr. *Riggs*, the bondsman, as security. I should think the notes were delivered *Riggs* the last of June or first of July. The checks were either in my hands or in my son's, while I was absent from *Bath*. The note or notes taken, I cannot say whether made payable to me or to me and my order : I think it was payable to me or order, but am not certain. I think my son took the note or notes from Mr. *Williams* in my absence, in obedience to my directions. The note or notes were delivered Mr. *Benjamin Riggs*, but whether I endorsed it or them or not, cannot say. He has it or them now in his possession, and it was, I think, given to him by my son. The amount I believe, of my official bond, is ten thousand dollars. My last quarterly account was made up including the fifteenth day of May last. I cannot say when it was forwarded, but think it was a month or two after that day. My accounts are usually made up in the course of ten or twenty days after the quarter ; that ending the thirty-first of March last, was rendered in April, and I have the comptroller's receipt of the same. The accounts rendered up to the thirty-first of March have been rendered both to the register and to the comptroller ; the account since that period has not been rendered to the comptroller ; but the one to the register has been. Owing to the difficulties about these bonds, the account has not been made up for the comptroller. I cannot give the balance on outstanding bonds on the thirty-first of March, but should think it exceeded fifty thousand dollars ; the balance of my cash account at that time was between three and four thousand dollars ; not far from four thousand dollars. I do not render a monthly account of bonds taken."

“I would not say that there was a bond of *Williams's* dated September eighth, eighteen hundred and twenty-eight. All bonds of these defendants, which were not handed over to Mr. *King*, were settled for by these defendants with me or my son. The bonds, settled with these defendants, were either discharged by myself, as Collector of the port of *Bath*, or by my son as Deputy-Collector; and presume they were given up to them thus discharged and cancelled. I think the bonds were executed by *Johnson Williams & Co.*, and *J. Williams*, attorney to *Simeon Mathews*; that the bonds of these defendants were usually executed in this manner, I had a power of attorney in the office authorizing Mr. *Williams* to sign for Mr. *Mathews*. I do not know that *Mathews* is a partner in the house of *Johnson Williams & Co.* It has been my uniform practice while collector, to receive checks in payment of bonds; and to discharge and cancel bonds upon the receipt of checks. Not more than five hundred dollars, I should think, was paid in specie while I was collector. Some gentlemen have frequently paid their bonds before they became due. I think the form of the bond used in that office is payable “on or before” a certain day. I should think that I had been near thirty years in the employment of the custom-house at *Bath*. This has been the uniform mode of payment at the office since the bank has been established—before that time drafts were taken. I have been Deputy-Collector from eighteen hundred and four or five, and until I was appointed Collector. I have been called as a witness by the District Attorney, in behalf of the *United States*, in their suit against *Johnson Williams* and others, pending in the District Court of the *United States*, September term, eighteen hundred and twenty-nine. I delivered up the office to Mr. *King* after office hours, on the fifteenth day of May last; from that period he has assumed the duties of the office. The bond now exhibited to me of date September 8, 1828, and payable June 8, 1829, is one of the bonds which I referred to as being settled by me or my son, and

was discharged, as appears on the back, on the twelfth day of May last by my son."

The plaintiffs next called *Denny McCobb*, who being duly sworn, testified as follows :

"*Johnson Williams* told me that he had received the bond of *Mr. Swanton*, upon giving his check for the amount. I understood him to refer to the bond in suit ; that afterwards, *Mr. Swanton* or *Mr. Swanton's* son, brought him the check and took his note for the amount, payable to *Mr. Swanton*, and not to his order. This was stated last evening at the public house in this town ; *Mr. King* was present. *Mr. Williams* said that *Mr. Swanton* would say the same. *Mr. King* requested *Mr. Williams* to state to me the circumstances, as he, *Williams*, was going away. *Mr. Williams* did not state whether the check was a memorandum check or not."

And thereupon the defendants being called upon by the District Attorney to produce the bond declared upon in the writ, did produce the same, with the endorsement and obliteration thereon, as the same is now, and which is set forth in evidence, as follows :

"MANIFEST, No. 50.

Good for \$739 56.

Know all men by these presents, that we, *Johnson Williams & Co.* of *Bath*, *Simeon Mathews* of *Waterville*, state of *Maine*, are held, and firmly bound unto the *United States of America*, in the sum of ten thousand dollars, to be paid to the said *United States* ; for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents ; sealed with our seals. Dated this eighth day of September, in the fifty-third year of the Independence of the said *United States*, and in the year of our Lord one thousand eight hundred and twenty-eight. The condition of this obligation is such, that if the above bounden *Johnson Williams & Co.* and *Simeon Mathews*, or either of them, or either of their heirs, executors, or administrators, shall and do, on or before the eighth

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day of June next, well and truly pay, or cause to be paid, unto the Collector of the Customs for the District of *Bath, Maine*, for the time being, the sum of twenty hundred dollars, or the amount of duties to be ascertained as due and arising on certain goods, wares, and merchandise, entered by the above bounden *Johnson Williams & Co.*, imported in the brig *Elizabeth*, *P. Higgins*, master, from *St. Eustatia*, as per entry, dated this date, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of
J. B. SWANTON."

" *Collector's Office,*
Bath, Maine, May 12, 1829. }

Received of *Johnson Williams & Co.* the sum of seven hundred thirty-nine dollars and $\frac{5}{8}$ in full of the within bond.

J. B. SWANTON, JR., *Dep. Collector.*"

And thereupon the defendants called *Parker McCobb*, who being duly sworn, testified as follows :

" I have been concerned in navigation for the last twenty years, and have been interested in bonds given to the custom-houses in *Bath, Boston*, and *New York*. All the bonds that I have taken up at *Bath*, have been paid at the custom-house, and by checks in all instances, that I recollect. Bonds at *Boston* and *New York* were paid at the Branch of the *United States Bank*, by checks or by bills; either checks on the Branch, or some other bank in the city. When I have given my check, I have taken my bond."

The defendants' counsel then read the following letter from the Comptroller of the Treasury, to *John B. Swanton*, to wit :

" *Treasury Department,*
Comptroller's Office, July 10, 1829. }

SIR—Having been informed by the collector of *Bath*, that you had not yet delivered over to him the duty bonds remaining unpaid on the 15th May 1829, the date of his oath of office, it

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will become my indispensable, although unpleasant duty, if the transfer alluded to be further delayed, to report your case for suit.

I have also to request that you will lose no time in depositing in the *Branch Bank* of the *United States* at *Portland*, to the credit of the Treasurer of the *United States*, the cash remaining in your hands, and forward the cashier's receipt therefor.

Respectfully, **JOSEPH ANDERSON, Comptroller.**

JOHN B. SWANTON, Esq."

The plaintiffs, by the District Attorney, then read the authenticated copy of the following letter, from the same to the same, to wit :

" *Treasury Department,*
Comptroller's Office, April 21, 1829. }

SIR—*William King, Esq.* having been appointed Collector of the Customs, and Inspector of the Revenue, for the port of *Bath, Maine*, you will deliver to him, on application, all the public property (cash excepted) in your possession, together with the books of entry, forms and instructions, with which you have been furnished by this Department, for all which you will take duplicate receipts, (specifying every article,) and forward one of them to this office.

Any public moneys you may have in your hands, you will deposit in bank, to the credit of the Treasurer of the *United States*, and forward the cashier's receipt for the same. Respectfully,

(Signed) **JOSEPH ANDERSON, Comptroller.**

JOHN B. SWANTON, Esq."

" *Treasury Department,*
Register's Office, Sept. 3, 1829. }

Pursuant to an act entitled "An act to provide more effectually for the settlement of accounts between the *United States* and Receiver of Public Money, I, *Thomas L. Smith*, Register of the Treasury, do hereby certify that the within is a true copy of a letter from *Joseph Anderson*, Comptroller of the Treasury, to *John B. Swanton*, late Collector of the Customs for the District

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of *Bath*, in the state of *Maine*, dated the 21st of April 1829, on record in this Department.

T. L. SMITH, *Register*."

"Be it remembered, that *Thomas L. Smith*, Esq. who has signed the within certificate, is now, and was at the time of doing so, Register of the Treasury of the *United States*, and that to all such his official attestations, due faith and credit is, and ought to be, given.

In testimony whereof, I, *Samuel D. Ingham*, Secretary of the Treasury, have hereunto set my hand and caused to be affixed the seal of this Department, at *Washington*, this third day of September, in the year one thousand eight hundred and twenty nine.

S. D. INGHAM, *Secretary of the Treasury*."

And also the following letter from the same, to *William King*, dated May twenty-eighth, eighteen hundred and twenty-nine, to wit:

"Treasury Department,
Comptroller's Office, 28th May, 1829. }

SIR,—I have received your letter of the 16th inst. enclosing your official bond and oaths of office, together with copies of two lists of bonds transferred to you by your predecessor in office. The bonds specified in these lists amount to \$29,310 $\frac{0}{10}$ $\frac{4}{10}$; but having, in consequence of your suggestion that he had withheld some bonds from you, had reference to his last returns, it appears that his balance in bonds amounted to \$19,350 $\frac{0}{10}$ $\frac{2}{10}$. It is evident therefore, that he has still in his possession bonds to a large amount, which ought to be delivered to you. If his object in retaining them be to collect the money, the course is irregular and improper; such having been decided by the Supreme Court in the case of *Sthreshley & Obannno vs. United States*, (*Cranch*, vol. 4, p. 169). You will therefore again apply to him to deliver over to you the bonds still retained by him, instructions to which effect will be given to him by this Department. Should he decline doing so, you will be pleased to inform

this Department thereof without delay, and notify the obligors that any payment made to him will not be valid in law.

In examining the official bond executed by you, I discover that the Clerk erroneously styled you "Collector of the Customs and Inspector of the Revenue for the port of *Bath*;" whereas it should have been "Collector of the Customs *for the district*, and Inspector of the Revenue for the *port of Bath*." I have therefore to request you to execute another bond, for which purpose the enclosed blank is transmitted to you. Should the same sureties who signed your former bond join you in this, it will be unnecessary to procure another certificate touching their sufficiency.

Respectully, **JOSEPH ANDREWS, Comptroller.**
WILLIAM KING, Esq. Collector, Bath, Maine."

And also the following letter from the same to the same, dated July the tenth, eighteen hundred and twenty one, to wit :

" *Treasury Department,*
Comptroller's Office, July 10, 1829. }

SIR,—In consequence of the representation in your letter of the 29th ultimo, the following lists have been obtained from the Auditor's office, and are forwarded for your information, *viz* :

1. List of bonds in suit.
2. Ditto, ditto, due on or before the fifteenth day of May, 1829, (the date of your oath of office,) and remaining unpaid on that day.
3. Ditto, taken before, but which did not become due until after the fifteenth of May, 1829.

Mr. *Swanton's* returns end with the 31st December, 1828, and the above mentioned list having been prepared from the records of those returns, the Treasury has no knowledge of what bonds due before the 15th May last may have been paid to him either before or after that day.

There can be no doubt, however, that any payments made to him subsequently to that day, will not exonerate the parties from their responsibility to the *United States*, for the duties for which such bonds were given.

Johnson *et al.* vs. United States.

Mr. *Swanton* will again be directed to place in your hands the bonds remaining unpaid on the day mentioned, and if he delays a compliance, his case will immediately be reported for suit.

Respectfully,

JOSEPH ANDERSON, *Comptroller*.

WILLIAM KING, Esq."

And also a letter from *John B. Swanton* to *William King*, dated May the fourth, one thousand eight hundred and twenty-nine, as follows :

"*William King*, Esq.,

SIR,—I will be in readiness to give you an abstract of bonds payable, and those in suit, together with the public property in my hands, by the fifteenth instant. Your obedient servant,

J. B. SWANTON.

Bath, 4th May, 1829."

And also the commission of *William King*, duly signed, and under the seal of said States, dated April twenty-first, one thousand eight hundred and twenty-nine. And the qualification of said *King* endorsed on the back thereof, dated the fifteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine, appointing said *King* Collector of the Customs for the District, and Inspector of the Revenue for the port of *Bath*, in said District.

To this evidence there was a demurrer on the part of the *United States*, and a joinder in demurrer.

The cause was argued by *Mitchell* and *Longfellow* for the plaintiffs in error, and by *Shepley*, District Attorney, for the *United States*. The grounds of argument are fully stated in the opinion of the Court.

On the plea of *non est factum*, *Mitchell* and *Longfellow* cited *Cutts vs. United States*, (1 *Gallis*. R. 69.)

On the plea of payment, they cited 6 *Cranch*, 264 ; 3 *Cranch*, 293 ; *Phillips's Evid.* 161 ; 4 *Mason*, R. 336 ; 10 *Mass. R.* 155.

The *District Attorney* also cited on the plea of payment, act of 1799, ch. 128, § 74 ; 2 *Pick. R.* 204 ; 1 *Gallis. R.* 381 ; 5 *Mass. R.* 299 ; 6 *Mass. R.* 143, 358 ; 11 *Mass. R.* 359.

As to a receipt being a discharge without payment, he cited 5 *East, R.* 230 ; 11 *Mass. R.* 263 ; 2 *Mason R.* 478 ; 9 *Wheaton R.* 483, 581.

As to act of agent binding principal, and how far, he cited 1 *Cranch*, 45 ; 3 *Dall.* 57 ; 5 *Wheaton*, 337 ; 11 *Mad. R.* 72, 88 ; 2 *Ld. Ray.* 930 ; S. C. 2 *Salk.* 442 ; 5 *Mass. R.* 37.

As to acts of public officers, how far binding, he cited 7 *Mass. R.* 460 ; 8 *Mass. R.* 84 ; 2 *Gallis. R.* 485, 393 ; 2 *Gallis. R.* 519 ; 1 *Mason R.* 504 ; 7 *Cranch*, 369.

STORY J. This case comes before the Court upon a writ of error, founded on a judgment in favour of the *United States*, upon a demurrer to evidence, preferred in behalf of the *United States*, and joined in by the other party. The general nature and operation of such a demurrer has been expounded with great force and correctness in the opinion delivered by Lord Chief Justice *Eyre*, in the case of *Gibson vs. Hunter*, (2 *H. Bl.* 187.) The Supreme Court of the *United States* has also, on various occasions, been called upon to discuss the nature and effect of the proceeding. But I shall do no more at present, than to refer to some of the leading cases, not meaning to comment on them.¹ The result of the whole is, that the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove. The demurrer should state the facts, and not merely the evidence of facts ; and it is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncer-

¹ *Young vs. Black*, 7 *Cranch*, 565.—*Fowle vs. Common Council of Alexandria*, 11 *Wheat. R.* 320.—*United States Bank vs. Smith*, 11 *Wheat. R.* 171.

tain, and may be urged with more or less effect to a jury. The Court, however, will, in favour of the party, against whom the demurrer is sought, as it withdraws from the jury the proper consideration of his case, make every inference for him, which the facts in proof would warrant a jury to draw. But if the facts are so imperfectly and loosely stated, that the Court cannot arrive at a satisfactory conclusion, that the judgment can be maintained upon the actual presentation of the evidence of these facts, then the course is to reverse the judgment, and to award a *venire facias de novo*.²

In considering the evidence in the present case, I have felt very great difficulties in satisfying my own mind, that the facts are so stated, that the Court can found any just conclusion as to the law applicable to the case. Under such circumstances, the proper course would be to award a *venire facias de novo*, in order to bring the facts more perfectly before the Court. But as no exception was taken by either side at the argument, and there was an implied waiver of any such exception; and as I am given to understand, that there are several cases depending upon the general questions discussed at the bar, I shall proceed at once to deliver my opinion upon them, passing by any farther consideration of the manner, in which they are presented on the record.

It may be taken as a fact, though it is no where directly averred, that *Swanton*, the witness, was the Collector of the Customs for the District, at the time when the bond in controversy was given, and that he acted as Collector *de facto* at the time of the supposed payment of the duties, and that the receipt was signed by his deputy *de facto* in the office. The bond, according to the condition, was payable on or before the 8th day of June, 1829; and the payment is supposed to have been actually made on the 12th of May, almost a month before the duties could have been demanded. It may be taken also as conceded by the parties, that *William King* was appointed Collector, and duly ap-

² 2 H. Bl. 187, 209.—11 Wheat. R. 320.

proved by the Senate on the 21st of April, 1829, upon the removal of *Swanton* from the office by the President; that *Swanton* had due notice of his removal, and of *King's* appointment, at least as early as the 4th of May; and that arrangements were made between them for the surrender of the papers and public property belonging to the office to *King*, as early as the 15th day of the same month; and of course, that the transaction, which gave origin to the present suit, took place in the intermediate period between the notice and the actual induction of *King* into office, which may be presumed to have been on the latter day.

A question very fairly open upon the record (which has, however, been expressly waived by the parties at the argument) is, whether by the appointment of *King* to the office, and due notice thereof to *Swanton*, the latter was not virtually removed from office, so as to cease, at least from that notice, to be collector *de jure*; and if so, whether all his acts as such, if not absolutely void, were not voidable by the government. That is a question of very grave importance, with which I should not choose to meddle unnecessarily. The collection act of 1779, (*ch.* 128, §§ 1, 21, 22,) while it provides for the appointment of collectors, and for the manner of executing the duties of their office in cases of their death, and disability, and absence, (§ 22,) has left the case of a removal from office wholly unprovided for. And the act of 1820, (*ch.* 102,) limiting the term of office of certain officers, and, among others, of collectors, has also left the case of a vacancy in office, produced by the expiration of such term, in the same posture. The great case of *Marbury vs. Madison*, (1 *Cranch*, 137,) great, not only from the authority which pronounced it, but also from the importance of the topics which it discussed, contains much reasoning, which might aid us in such an inquiry. It is there, among other things, said, "that when a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office,

and had created the original vacancy.” From this remark it might perhaps be thought, that the removal of the actual incumbent from office was complete by the new appointment, independent of any acceptance by the new appointee.

But waiving all consideration of this question, let us see what are the grounds, upon which the case was rested at the argument.

And first, as to the plea of *non est factum*, it is admitted, that the bond was originally executed by the defendants, and was sufficiently binding in its legal operation. But the argument of the defendants is, that it is no longer a subsisting obligation; it is no longer their deed, having been cancelled, and being produced by them, in that state, in Court, the issue ought to be found in their favour.

When a deed is once legally cancelled, it is doubtless *functus officio*, and cannot again be set up as a subsisting deed. And doubtless the production of it in a cancelled state, is *primâ facie* evidence to support the plea of *non est factum*. But every cancellation does not, *per se*, operate a destruction of the legal validity of a deed. If the cancellation be by mistake, or accident, or fraud, against the intention, or without the co-operation of the obligee, I have no doubt, that it may still be declared on as a subsisting deed by the obligee. In the case of *Cutts in Error vs. The United States*, (1 *Gallis. R.* 69,) which has been cited at the bar, I had occasion to examine the doctrine inculcated by the old authorities upon this subject. It does not appear to me, that there is any sufficient authority, upon which to found a different doctrine from that which I now express. If there are dicta, or even cases, looking somewhat at variance with it, they do not, in my humble judgment, entitle themselves to any serious regard, when compared with others, which contain more rational principles, consistent at once with common sense, and the just analogies of the common law.³ If by mistake of the parties one bond is cancelled,

³ See *Shepp. Touchstone*, ch. 4, p. 66, § 6.—*Com. Dig. Fait.* 1, 2.—*Viner Abridg. Faits.* X. 1, 2. as to the general doctrines on this subject in the old cases.

instead of another ; if by accident a seal is torn off or destroyed ; if by fraud a name is erased, or any obligatory clause obliterated, it seems difficult to imagine, that, in any rational system of jurisprudence, such circumstances should be held to discharge the obligation. But at all events there can be no doubt, that where a cancellation or destruction of the deed has taken place by the mistake or connivance or fraud of the obligor himself, without any assent of the obligee, the instrument itself may still be declared on as a subsisting deed. The authorities referred to in *Cutts vs. United States*, (1 *Gallis. R.* 69,) fully support this position.

In the present case no doubt exists, that the cancellation was made with the entire privity and consent of the obligors. If it has been wrongfully made, they cannot avail themselves of the fact to escape from their original personal responsibility. And the question, therefore, really resolves itself into the point, whether there has been a cancellation under circumstances, to which the law attaches validity.

It is admitted, that the receipt of the deputy-collector *de facto* is genuine, and if payment was in fact made of that bond, as it purports to be in that receipt, the bond was legally extinguished, and the cancellation justifiable. There is no pretence to say, that the bond has been extinguished in any other manner ; and we need not meddle with any other foreign considerations. If no payment has been in fact made, is the cancellation nevertheless to be deemed valid ?

In the first place, it is to be considered, that this is not an act done by the obligee in the bond with the privity of the obligors, but by an agent of the obligee ; and that agent not a private agent, but one whose duties and powers are defined and limited by law. The obligors cannot plead ignorance of the limitations of such duties and powers prescribed by law ; but they are bound, as all citizens are, to take notice of them. If a private agent were, by connivance with the obligors, to cancel an obligation contrary to the known instructions of the obligee, such an act

would not bind the latter. Such an act, call it by however gentle a name we may, would be, in contemplation of law, a fraud upon the obligee. *A fortiori*, the act of a public officer in violation of the duties of his office, which duties constitute a part of the vital arrangements of the government, cannot be permitted to have any legal effect by way of defence to those who have participated in the violation, and encouraged and aided it. I hold it most clear, that the acts of a public officer beyond the scope of his powers, and in violation of his public duties are, in such cases at least, utterly void. A different doctrine would lead to the most alarming and mischievous consequences, and unsettle some of the best established principles of the law of agency. I, for one, do not incline to retract a syllable which was uttered on this subject in the case of *United States vs. Lyman*, (1 *Mason R.* 482,) and the case of the *Margaretta*, (2 *Gallis R.* 515.)

Then, could the collector or his deputy lawfully cancel the present bond without an actual payment of the money due for the duties? Clearly not, unless we are at liberty to disregard the whole objects as well as the express words of the act of 1799, *ch.* 128, for the collection of duties. I meddle not with cases of discharges from debts by other officers, as by sheriffs upon executions, without payment, which may, for aught I know, be open to the government of other principles. Sheriffs are officers of the law, and not mere agents of private persons, or of the government; and how far their acts would be upheld in plain violation of their duty, and in fraud of the law, it is not now necessary to consider. In the case of collectors, there is an express provision of law to which this Court must listen; and it would be monstrous to say, that the whole duties accruing to the government from importers, might be evaded by connivance with him in fraud of the law.

Then, it is said, that here the Court cannot go into the consideration of the fact of payment, because the receipt of a public officer is an estoppel to the government to deny the payment. That proposition is liable to many objections. In the first place, the

general principle in relation to governments is, that they are not bound by estoppels, under instruments created by themselves, although they may be where the estoppel is derivative from another under whom they claim a title.⁴ In the next place, the act of an agent never can bind his principal by way of estoppel, unless it is within the scope of his agency. And in the next place, receipts, not under seal, do not belong to that class of instruments which are effected by the doctrine of estoppels. They have been solemnly adjudged to be open to contradiction and denial.⁵ The receipt is, indeed, *prima facie* evidence of payment; but it is no more. If it has been signed by mistake or by fraud, or by other improper contrivances, without actual payment, it is not conclusive upon the government.

Then, has there been any actual effective payment which can give support to the cancellation on the first issue, or establish the material allegations of the second issue? The admitted facts are, that there was no actual payment made in money; that the cancellation was made upon a check, being given by *Williams & Co.*, or on their behalf, on the *Lincoln* bank; that the check was never presented for payment at the bank, but a few days afterwards the check was given up to *Williams*, who gave in lieu thereof, the notes of *Williams & Co.* for the amount of the check, payable to the collector, or to him or his order; and by the collector put into the hands of one of his sureties, on his official bond to the government, by way of indemnity. Neither the check nor any equivalent fund ever came into the hands of the new collector. Whether the check so received was a memorandum check (that is, a check given as a mere memorandum of the amount of a debt, and not a business check to be presented immediately at the bank for payment) or not, does not appear from the evidence. The

⁴ See *Carver vs. Jackson*, 4 *Peters's Sup. Ct. Rep.*

⁵ See *Handen vs. Gordon*, 2 *Mason R.* 541.—1 *Johns. Dig. Evid.* XI. § 150.—*Veal vs. Warner*, 1 *Saund. R.* 325 and note.—11 *Mass. R.* 27, 143, 359.—17 *Mass. R.* 249.—3 *Stark. Evid.* pt. 4, 1271.

collector states in his testimony, that he cannot say, whether it was or was not, though he considered memorandum checks as *best*, because the cashier would not be likely to pay them to a third person. That a jury would infer from these circumstances that it was a memorandum check, can admit of very little doubt; that a Court upon this proceeding ought to infer it, is a matter of more question and difficulty. Upon the plea of payment, the *onus probandi* is upon the defendants; and therefore, if the evidence left the matter in doubt, that would be decisive against them upon that issue. To say the least, the *primâ facie* evidence of payment, stated in the receipt, would be brought into most serious doubt by such a posture of the accompanying facts.

But it is said, that payment by a check is a good payment; that this is the doctrine of the local law; and it is supported by the general custom of merchants in the payment of duty bonds. And it is farther contended, that the local law, and the custom, are equally obligatory upon the *United States*. I am not prepared to admit either position. It is not competent for the state legislation to regulate the rights of the *United States*, in respect to payments by their debtors. The general government has a right to prescribe its own rules on this subject. And as to the custom of merchants, it can clearly have no operation to make law, much less to supercede the actual provisions of the law, in respect to the sovereign rights of the government. Without doubt, a common practice exists, founded upon the mutual convenience of the collector and the debtors at the custom-house, to receive the checks of the latter in payment of duty bonds. This, however, is a mere affair of private confidence; but if the check is not paid at the bank, it does not amount to a payment of the duty bond, or compromise the rights of the government, for the plain reason that the laws nowhere recognise any such right in the collector, to receive such checks in payment. Both he and the debtor, act, in such cases, at their own peril; the former in delivering up the bond, the latter in receiving it without actual payment. This is

true in respect to checks received ordinarily in the course of business by the collector, where an immediate demand and payment thereof is intended and expected by the parties. But suppose the collector should keep the check until the bank had failed, or the party should afterwards, by other checks, withdraw his funds from the bank, so that when presented, payment should be refused, would it be contended that the government were bound, or had made the check its own, by the improper act of its officer? I hold, clearly not. The 74th section of the collection act of 1799, (ch. 128,) declares, that all duties to be collected shall be payable in money of the *United States*, or in foreign gold or silver coins, at certain rates stated in the section; and even foreign coins are not receivable, which are not by law a tender, unless by a special proclamation of the President of the *United States*. This is a plain provision, which admits of no controversy. How can any collector, by any arrangement, not to say by any connivance with a public debtor, supercede it? If such debtor do concert an evasion of it with the collector, is it not a fraud upon the law? If so, *a fortiori*, a memorandum check would be no payment. Would there be any pretence to say that the collector had a right to receive any goods, or lands, or collateral securities in payment? Where are we to stop, if we do not stop at the plain terms of the act?

But it is by no means clear, even by the local law, that taking a check in payment of an antecedent debt, is to be deemed a payment of the debt, unless it has been presented for payment and paid, or the creditor has made it his own by his conduct. The case of *Dennie vs. Hart*, (2 Pick. R. 204,) looks strongly the other way. And it is manifest that in our local law, varying in this respect from the general commercial law, a negotiable check or note is not deemed absolute payment; but it is open to be rebutted by any circumstances which establish that the parties did not so intend it. In the case now before us, it does not even appear that the debtors had any funds in the *Lincoln*

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bank ; the check was never presented or paid, and the drawers afterwards received it back without any payment. Under such circumstances, it would be difficult to maintain, before a jury, that the parties ever originally intended that it should be deemed an absolute payment, even if the case could be brought (as I think it cannot) within the reach of the local law.

Upon the whole, looking at this case with reference to the points made, and so elaborately discussed at the argument, and at those only, I am of opinion that the judgment upon the demurrer ought to be, as it was in the Court below, in favour of the *United States* ; and the judgment ought to be affirmed accordingly.⁶

UNITED STATES vs. JACOB SHACKFORD IN ERROR.

To affect the master of a vessel with the penalty provided for his non-delivery of a temporary register, granted under the 3d Section of the Coasting Act of 1793, ch. 52, there must not only be an arrival at the port, to which the vessel belongs, but it must be an arrival there, not by accident, or from necessity, but intentionally, as one of the termini of the voyage.

DEBT for the penalty of one hundred dollars, against the defendant, as master of the schooner *Sarah*, of *Eastport*, for not delivering up a temporary register, obtained in the district of *New York*, within ten days after the arrival of the vessel at *Eastport*, where she belonged, according to the provisions of the 3d section of the coasting act of 1793, ch. 52.

The case came before the District Court upon an agreed statement of facts, as follows :

“ In this case it is agreed, that the schooner *Sarah*, of which the defendant was master, belonged to *Eastport*, and was there

⁶ See also

8 Cowen R.

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true in respect to checks received ordinary
 business by the collector, where an immediate
 thereof is intended and expected by
 the collector should keep the check
 the party should afterwards, by order
 from the bank, so that when presented
 ed, would it be contended that the bank
 made the check its own, by cashing it
 clearly not. The 74th. (128,) declares, that all
 money of the United States, and did not
 certain rates stated in the proclamation
 receivable, which is contrary to the

proclamation. Hence, the cause is submitted to the decision of
 plain provisions, giving the right of appeal, as from a judgment ren-
 collector, verdict."

a public District Court pronounced a judgment in favour of the de-
 evasior upon which a writ of error was brought to the Circuit
 If so. And now, at this term, the cause was argued by Shepley,
 W. District Attorney, for the United States, and by Greenleaf, for
 the defendant.

STORY J. The third section of the coasting act of 1793 (ch.
 52) provides, that the collectors of the several districts may en-
 roll and license any ship or vessel, that may be registered, upon
 such registry being given up, or register any ship or vessel that
 may be enrolled, upon such enrolment and license being given up.
 And when any ship or vessel shall be in any other district than
 the one to which she belongs, the collector of such district, &c.
 shall make the exchanges aforesaid. But in every such case,
 the collector to whom the register or enrolment and license may
 be given up, shall transmit the same to the register of the treas-
 ury; "and the register or enrolment and license granted in lieu
 thereof, shall, within ten days after the arrival of such ship or ves-

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district, to which she belongs, be delivered to the said district, and be by him cancelled. And if commander shall neglect to deliver the said and license, within the time aforesaid, he dollars."

facts is, whether in this case there was in the district of *Eastport*, to which the act, so that the penalty of one incurred by the neglect of the master to deliver a temporary register to the collector of the district within the ten days prescribed by the act. The argument of the District Attorney is, that every coming into the district is an arrival, in the sense of the act, although it may not be in the course of the voyage on which the vessel is bound, nor within the original contemplation of the parties when it was undertaken. It goes then to this extent, although not so stated in terms, that if the vessel come in from necessity, or be driven in by stress of weather, or seek the port to avoid capture by an enemy, it falls within the reach of the act, as much as if it was a voluntary arrival, however short may be the stay, or fugitive the purpose of it. The argument on the other side is, that the arrival must be within the district as a port or place of destination on the business of the voyage, and so contemplated by the parties, as one of the termini, if not the sole terminus of it.

It is doubtless true, that the term "arrival" is susceptible of either interpretation, according to the language of the context, and the objects of the legislature. It may be used in the most general sense, as importing a mere entry within the local limits of the district; or it may be restrained to such an entry as is purely voluntary, for objects connected with the voyage, and a part of the enterprise. Whether the one sense or the other is to be adopted, depends upon a just survey of the language, and the policy of the statute. There are many instances in our revenue laws, where the word is used in the more limited as well as in the larger sense.

MAY TERM, 1830.
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Paid, and the drawer
of the bill, and the jury,
and the court.

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In the 22d section of this very act, there is a provision applicable to coasting vessels *putting into* a port, other than that to which they are destined, where the master is required to make a report to the custom-house within twenty four-hours after his *arrival*, if he continues so long in port. The word "arrival" is here manifestly used in its most general sense, as a mere putting or coming into port, for any purpose whatsoever. On the other hand, there seems little doubt, that the arrival, spoken of in the sixth section of the act, refers to an arrival at the port of destination, as the arrival spoken of in the 15th and 17th sections certainly does.

The question then resolves itself into a question of the true construction of the terms of the act, with reference to the context and policy of the act. Now, we are to recollect, that this is a penal clause, and if either of the two constructions may be adopted, and each tallies with the language, and interferes with no known policy of the act that ought to be adopted, which is most liberal to the citizen, and burthens him with the least restraints. But if one construction be exceedingly inconvenient, and the other safe and convenient, *a fortiori* ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations, unless for some known object, or from some express declaration.

Now, the plain object of the legislature is, generally, to have vessels registered, enrolled, and licensed, in the ports or districts to which they belong. But it is not required if a change from a registry to an enrolment, or *è contra*, is desirable to the owner, with a view to his own accommodation or business, when the vessel is absent from her home-port, that she should be compelled to return to the home-port *directly*, without embarking in any intermediate voyage. The language of the act justifies a totally different construction. If a vessel is enrolled, and is in a distant port, the owner may surrender her enrolment, and have her registered so as to embark on a foreign voyage; and it is no viola-

lation of the policy of the act, that she should perform several foreign voyages under such temporary register before her return to the home-port. All that is required is, that when she does return, the temporary register shall, within ten days after her arrival there, be surrendered. No period is provided, after which the temporary register shall cease to have a valid operation, unless there be such an arrival at the home-port. No known policy of the act is broken in upon by any delay to return, however long. The object of the legislature is, to promote the interests of the ship-owner, and the encouragement of trade. The natural presumption is, that the vessel will return home, that she has, so to say, the *animus revertendi*, as soon as the interests of the owner require it; and as the ship in the mean time carries in all her papers, complete proofs of her domicil and her ownership, there is no danger of loss to the revenue of the government, or of mistake of her real character and trade.

If the District Attorney is right in his argument, then, in all cases of a change of the ship's papers, the vessel may be materially retarded in her commercial operations from unforeseen casualties. Suppose a vessel, engaged in a foreign voyage, is driven by storm or other necessity into her home-port, it will then become the duty of the master, even if his stay might not otherwise be intended for an hour, or a day, to wait until he can communicate with the custom-house, and surrender his papers and procure new ones. Now, in the home-port, in order to procure a new register or enrolment, the owner is required to take an oath of ownership, and the master, if present, an oath of his citizenship. The owner may be temporarily absent on a journey; the vessel may arrive in the night, or in hours when the custom-house is closed; she may arrive on a Sunday, or at an out-port at a great distance from the Collector's residence; she may arrive in an inclement season, when access to him is difficult; her voyage may be vitally affected by the retardation of a few hours or days. In cases of this sort, (and many such may be imagined,) it is easy to see, if

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a rigid construction be adopted, that great embarrassments, if not material injuries, may arise to merchants and owners, from causes wholly beyond their control. Could the legislature have intended to impose restraints upon trade, unless for some great and obvious benefit? Ought not maritime laws, affecting employments so liable to accidents and disasters, and unforeseen emergencies as navigation and trade, to be liberally construed in doubtful cases, so as to ward off, rather than to add weight to, the pressure of uncontrollable misfortunes? My opinion is that they ought, and that it would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties.

It appears to me that the true interpretation of the section under consideration is, that the arrival of the vessel pointed at, is an arrival within the scope of the voyage; an arrival in the district, not only voluntarily, but as a port of destination, or terminus of the voyage. I do not say the sole or the ultimate port of destination, for I readily admit, that if the home-port constitutes one of the places within the contemplation of the parties, where the vessel is to stop for the trade or business of the voyage, that would bring the case within the act, notwithstanding any ulterior destination. But a mere arrival in the district in the transit from one port to another, either accidentally or voluntarily, but for no purpose originally connected with the employment or objects of the voyage, and as a mere emergent incident, or fortuitous occurrence, is not within the purview or policy of the act. The act contemplates an intention to abide in the port, or at least it indulges a supposition that the vessel may, in some cases, remain there ten days; for it inflicts no forfeiture for a non-delivery within that period. It looks, therefore, to some intentional arrival, which may last for such a period by design; and this may well be deemed a provision unlocking its real meaning.

Upon the whole, I entirely concur in the opinion of the District Judge, and think that an arrival within the purview of the section must be an arrival with an intention to return to the home-port, as

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one of the termini of the voyage, and in the course of prosecuting it. It must not be a mere touch or stay for accidental and transitory purposes, having nothing to do with the original enterprise.

The judgment must therefore be affirmed.

THE SCHOONER RUBY.

Notwithstanding an order of the Court, closing all testimony in a cause, after a limited time, under a commission, the Court will enlarge it, upon proof of new discovered evidence, which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof.

THIS was a case of seizure. At the last May Term of this Court (1829), upon motion, the following order was made :

“ The Court order this cause to be continued, on the motion of the District Attorney, he assenting to the following terms and conditions :

“ 1. That the testimony of any of the witnesses of the defendant, who have attended at the present term in behalf of the defendant, may be taken down by the clerk and used as evidence in the Court.

“ 2. That all other testimony, taken hereafter in the cause, shall be by commission, according to the common rules of the Court.

“ 3. That the commissions taken out by the *United States*, shall contain the names of all the witnesses to be examined under the commission, *and shall be filed within sixty days after the end of the present term.* And such commissions, when executed, shall be returned as soon as may be to the clerk's office, and opened by the clerk, and be subject immediately to the inspection of either party.

The Schooner Ruby.

“4. That the defendant shall be entitled to take out any commission to meet such testimony after inspection, *so that the cause may be heard at the next term.*”

Shepley, District Attorney, now moved the Court to enlarge the rule, so as to allow new evidence, which had come to the knowledge of the District Attorney since the former order of the Court had been complied with, to be taken under the commission, and admitted in the cause.

Emery, for the claimants, objected, upon the ground that the application was not justified by the former order of the Court, which, having been made with the assent of the District Attorney, was conclusive.

STORY J. We are of opinion that the former order of the Court ought not to govern us under the circumstances of the present application. It would be conclusive as to any testimony known to the District Attorney, and which might have been taken by him under the authority of the former order. But this is the case of new evidence discovered since that order was made, and not in the contemplation of the parties when the former commission was executed. It is therefore the common case of an application by the party, to avail himself of new evidence material to the merits, where there has been no prior knowledge, and of course no laches on his part to affect his rights. Even after a trial, Courts of law are in the habit of granting new trials under circumstances of this sort. And if so, there can be no just reason why the application should not be entertained in a suit in Admiralty, addressing itself to the sound discretion of the Court. The former must be necessarily restrained in its operation to evidence antecedently existing and known to the District Attorney, so that it might be taken under the former commission.

Motion granted.

CIRCUIT COURT OF THE UNITED STATES

Spring Circuit.

MASSACHUSETTS, MAY TERM 1830, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

UNITED STATES vs. SHADRICK KEEN.

It is no defence to an indictment for forcibly obstructing or impeding an officer of the Customs in the discharge of his duties, that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged.

INDICTMENT against the defendant, for forcibly obstructing and impeding one *James Gooch*, an officer of the Customs, and an Inspector, in the discharge of the duties of his office, against the act of 1799, *ch.* 128, § 71; act of 3d of March 1815, *ch.* 246, § 3; and act of 3d of March 1823, *ch.* 186, § 3. Plea, not guilty.

At the trial it was admitted that *Gooch* was an Inspector of the Customs, and known as such by the defendant. Evidence was also before the jury for the purpose of showing, that *Gooch*, while in the actual discharge of his duty as inspector, in superintending the unloading some goods on board of a vessel in the port of *Boston*, was, upon some sudden quarrel between the parties, assaulted and struck several times by the defendant.

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Welsh, for the defendant, contended, that it was not sufficient that there was an actual obstruction of the inspector in the discharge of his duties, but the assault must be, not for the purpose of personal chastisement, but with intent to obstruct him in his duties.

Dunlap, è contra.

STORY J., in summoning up to the jury, said,— The Court are clearly of opinion that the argument of the defendant's counsel upon the point of law, cannot be maintained. To constitute an obstruction or impediment within the meaning of the act, it is not necessary that the party should intend to obstruct or impede the officer in the discharge of his duties. If the officer is in fact obstructed or impeded in the discharge of his duties by a person, knowing him to be an officer, then engaged in his duties, the case is within the act. It is wholly immaterial that the party has another object in view, to avenge a supposed wrong or affront, or to inflict a personal chastisement. The law intends to protect public officers, while in the discharge of their duties, from all violence and forcible impediments. That is not the time or place to avenge private quarrels. The security of the revenue, as well as the convenience of merchants, requires that such a protection should exist. The fact of forcible impediment, and not the private intent of the party, if the fact is unjustifiable, constitutes the offence in contemplation of law.

Verdict, guilty.

UNITED STATES vs. JONATHAN AMORY.

Where there is a general assignment of a debtor's property, for the benefit of creditors, and the priority of the *United States* attaches, they having various debts due by bonds, with *different* sureties, all payments made by the assignees are to be applied *pro rata* to all the debts of the *United States*; and the latter are not at liberty to apply the payments in any other manner, without the consent of all the parties in interest.

THIS was a bill in equity. The facts arising in the cause are fully stated in the opinion of the Court. It was spoken to at several times by *Dunlap*, District Attorney, for the *United States*; by *F. G. Loring*, for *Dexter* and *Holbrook & Dexter*; by *Merrill & Samuel Hubbard*, for *Daniel Appleton*; and by *William Sullivan*, for *Jonathan Amory*.

STORY J. The present bill in equity is an amicable suit brought against *Jonathan Amory Jr.*, surviving assignee of the firm of *Jonathan Amory & Jonathan Amory Jr.*, as assignees of *Messrs. Adams & Amory*, for an account, and to compel satisfaction of certain debts due to the *United States*, for which the *United States* have a right of priority of payment, out of the funds in the hands of the assignees. *Messrs. Adams & Amory* became insolvent in May, 1826, and on the 25th of that month made an assignment of their property and effects to certain persons, for the payment of their creditors, and these persons having declined, the *Messrs. Amory*, the defendants in the bill, succeeded to the trust. There is no difficulty on the part of the assignees, in rendering an account of the monies received by them; and they have already paid into Court the sum of \$20,433.60, which is all that at present they can properly account for, there being still some outstanding claims in litigation. The real question is, in what manner the sum so paid in, shall be appropriated by the Court towards satisfaction of the debts due to the *United States*, the same having arisen from various custom-house bonds,

United States vs. Amory.

on which there are various sureties, who have an interest in the appropriation. The assignees alone are regularly before the Court, as parties; but all the sureties having consented to be bound by such decree as the Court may make, and having desired a final settlement of the question, and the District Attorney having agreed to that course, I have thought it my duty to proceed to make such a decree, especially as the point is raised in the answer of the assignees.

The assignment of Messrs. *Adams & Amory*, after reciting that it is made to secure certain creditors, indorsers, sureties, and guarantors, for their debts and liabilities, conveys all their estate and effects &c. to the assignees for sale, and after deducting charges and expenses, to apply the proceeds, first, to the payment of certain preferred debts and liabilities, mentioned in a schedule annexed to it, *pari passu*; and afterwards to all other creditors, &c. *pari passu*; and the surplus, if any, to hold in trust for the assignors. And the further usual powers are given to the assignees. It is observable that no notice whatsoever is taken in this instrument of debts due to the *United States*; but it being the intention of the parties that all custom-house bonds should be paid before any debts due to private creditors, a supplemental instrument to that effect was drawn up and executed on the 2d of June following, and was signed by all the parties who had previously signed the original assignment, except one, who is not understood to dissent from it. On the 6th of the same month, the defendants were in due form substituted as assignees.

At the time of their failure, Messrs. *Adams & Amory* were indebted to the *United States* upon custom-house bonds, upwards of 92,500 dollars, and upon these bonds there were various sureties. All of these bonds became due after the assignment; and upon the principal part of them, judgments have been obtained by the *United States* against the principals and sureties, as stated in the bill. Upon some of these bonds, Messrs. *Holbrook & Dexter*, and others, were sureties; upon others, *Daniel Appleton* was

also surety ; and upon others, some persons whom it is not now necessary to particularize. Judgments appear to have been obtained upon bonds, where *Appleton* was a surety to the amount of \$16,576 50 ; and where *Holbrook & Dexter* and others, or *Thomas A. Dexter* and others, were sureties, to the amount of about \$70,000. *Appleton* has petitioned the Court to have so much of the money paid into Court, as may be necessary for the purpose, applied in discharge of the bonds upon which he is surety. This was originally resisted by *T. A. Dexter*, on behalf of himself and others, and he prayed that the fund might be apportioned among all the bonds, *pro rata*. But it appearing that a balance of about \$12,000 is now due from Messrs. *Dexter & Co.* to Messrs. *Adams & Amory*, *Dexter* now assents that *Appleton* may have a preference to that extent out of the fund, and that the residue only shall be applied *pro rata* to all the bonds.

We are, then, to take the case as one, in which all the sureties agree, that to the extent of 12,000 dollars the Court may, if it has authority for this purpose, appropriate the amount in discharge of *Appleton's* suretyship on the custom-house bonds. It is material also, to observe, that the *United States* do not oppose such an appropriation, with this reserve only, that it shall not compel them to allow the debentures upon any of the bonds, to which the fund shall be so appropriated.

In the first place, as to the authority of the Court, I have no doubt, that, sitting in equity, it has a right to restrain the *United States* from exercising its power in cases of priority injuriously to the sureties upon the various bonds to which that priority applies. Whenever there is a general assignment of all the estate of a debtor, and the *United States* have various debts secured by various sureties, I conceive, that the aggregate constitutes but a single debt, and that the priority attaches to it as a whole. All payments, therefore, that are received by the *United States* under such circumstances, are to be deemed payments upon the whole debt, and they must be applied *pro rata* to the extinguishment of

all. It is not like the case of payment by a debtor, where, he failing to make an appropriation at the time of the payment, the creditor may then appropriate it as he pleases. In cases of assignments and other cases where the right of priority attaches, the provision is in effect, that the fund shall be first applied to the extinguishment of debts due to the *United States*. But the assignees are to apply the fund generally, not to one particular debt, but to all debts due to the *United States*. It would be a violation of their duty to apply it to one debt, to the fraud or injury of sureties. If they are to pay generally, without any specification in the assignment of any preference or priority of any particular debt of any creditor, the law deems each debt as equally entitled to be extinguished *pro rata*; for equality is in such cases equity. The assignor has not trusted the assignees with any authority to create a preference, and the creditor has no right to demand it. He must make payments as the debtor has provided, or as the law upon his omission has appropriated them.

The argument at the bar has gone somewhat farther, and assumed, that the Court, in cases of this nature, will undertake to adjust mere equities between the principal and sureties on different bonds, and the creditor. Without saying that the Court will never undertake such a duty, it is sufficient to say, that the case must be very special indeed, in which it will interfere against the creditor to adjust equities between different classes of sureties, with which the creditor has no privity or connexion. All that the Court will generally do in cases of this nature is, to see that the creditor does not himself misapply the payments. The creditor has nothing to do with the state of the accounts between different sureties, or with cross claims, which they might assert against each other, if they were the principal parties to the suit. And sureties have no right to call upon the creditor to change the general rule of law as to appropriation of payments, merely because it may not work right in respect to their own private claims, with which the creditor has no concern.

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It is very clear to me, therefore, that in this case the whole fund ought, upon principle, to be applied *pro rata* in extinguishment of all the priority debts due to the *United States*.¹ But if the parties interested will consent to a different appropriation, there is nothing to prevent this Court from carrying any such agreement into effect.

I shall therefore decree, that so far as respects the \$12,000, admitted to be due from *Dexter & Co.* to Messrs. *Adams & Amory*, the fund now in Court to that extent shall, with the consent of the *United States*, be appropriated to the extinguishment of the bonds and the judgments thereon, for which *Appleton* is surety, upon his delivering up the debentures, which have been given by the *United States*, for the draw-back of any of the duties on the goods, for which the same bonds were originally given, or his extinguishing in any other legal manner the same debentures.

I wish to add, that it is not to be understood, that the Court will exercise any authority, or interfere between different sureties, or adjust any equities between them in respect to the fund, except so far as to direct that the appropriation shall be *pro rata* in cases where the right of priority attaches. All other arrangements are matters of private consent between the parties and the *United States*.

¹ See *Favenc vs. Bennett*, 11 East, 38, 42.

UNITED STATES vs. SAMUEL P. SAVAGE.

To constitute an endeavour to commit a revolt within the crimes act of 1790, ch. 36, it is necessary that there should be some effort or act to stir up others of the crew to disobedience of the master.

To constitute a confinement of the master within the purview of the same act, it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement upon the master.

The master has authority to displace the mate, and all other subordinate officers, during the voyage. If he abuses his authority, he is responsible for the wrong.

Seem, that the mate is a seaman, within the crimes act of 1790, ch. 36, § 12.

INDICTMENT against the defendant, who was *mate* of the ship *Plato*, *Charles Knapp* master; (1.) for confining the said master, and (2.) for an endeavour to commit a revolt on board of the ship, against the crimes act of 1790, ch. 36, § 12. Plea, not guilty.

C. G. Loring, for the defendant, in the course of the trial contended, (1.) that to constitute a confinement within the act, there must be an intention to confine the master. If the party seize the master to inflict personal chastisement upon him, and not to confine him, it is a case not provided for by the act. *Abbott on Shipping* 141, note. (2.) That the endeavour to commit a revolt must be established by some proof of an attempt to stir up others to revolt; for which he cited 1 *Mason R.* 147; 4 *Mason R.* 107. (3.) That the mate is not a *seaman* within the provision of the act of 1790, ch. 36, 7 *Connecticut Rep.* 239. (4.) He also argued largely upon the facts, to show, that no case was made out against the defendant.

Dunlap, for the *United States*, on the first and second points, cited 1 *Peters's Circuit R.* 213, 214; 3 *Wash. Circuit R.* 525, 527; 4 *Mason R.* 107. On the third point, he cited *Bailey vs. Grant*, 1 *Lord Raym.* 632. On the fourth point he argued, that the facts were fully made out for a conviction of the defendant.

STORY J., after summing up the facts, said, — The point, whether the mate be a seaman within the reach of the statute, will be reserved for further consideration, if the verdict shall be against the defendant upon the other facts. But for the present trial, we hold that the mate is a seaman, and is to be so deemed for all the purposes of the statute.

As to the definition of an endeavour to commit a revolt, it seems unnecessary, after the numerous decisions in this Court, to go at large into the subject. The Court adhere to the doctrine, that to constitute an endeavour to make a revolt, there must be some effort or act to stir up others of the crew to disobedience of the lawful commands or authority of the master. However reprehensible in other respects the conduct of the party may be, if it has no such aim or object, he is not within the provisions of the statute.

In respect to the confinement of the master, we do not concur in the argument of the defendant's counsel. If the person of the master is in fact seized, or if he is in fact held in personal restraint, (whether for a long or a short time is immaterial,) it is a confinement within the meaning of the statute; and of course it subjects the party to punishment, unless he can establish, that it was done in justifiable self-defence, or for some other legal cause. It matters not, that the seizure or restraint was principally or wholly for the purpose of inflicting personal chastisement upon the master; that it was to beat, or to wound him, and not to deprive him of his command or authority on board the ship; or that the confinement was a means of personal punishment, and not an end. The law looks to the act, and not merely to the intent. If the seizure is unlawful, it is a confinement. The law esteems the person of the master sacred, and protects him from all restraint, which is unlawful.

There is another point, which has been suggested by the argument at the bar. How far has the master a right to displace the mate? We are of opinion, that he has this authority absolutely;

and the mate is in such a case bound to submit. The master is the lawful agent of the owner for this purpose, and the authority is entrusted to him from motives of great public policy, to secure due subordination on board, and to promote the vital interests of navigation and trade. If the master abuses his authority, or exercises it in a wanton or malicious manner, he is responsible for his conduct. But his authority is conclusive upon all inferior officers. If he displaces the mate, the latter is bound to abstain from all future exercise of his ordinary authority on board of the ship. He is bound to deliver up the log-book, and resign the state-room set apart for the officers. He is not indeed to be treated in a harsh or disgraceful manner. He is to have suitable food and lodging, and conveniences assigned to him by the master. But like every other person on board, he is bound to submit to all reasonable commands, and to conduct himself in a quiet and inoffensive manner. Being no longer in office, he is to be deemed a *quasi* passenger; and his remedy for any grievance lies by an appeal to the laws of his country for redress, and not by any attempts to avenge his wrongs, or to inflict personal chastisement on the master.

Verdict for the defendant.



JOSEPH J. FALES AND WIFE,

vs.

ELLEN M. GIBBS AND WILLIAM R. KELLY.

A writ of entry, to foreclose a mortgage, may be well maintained against a tenant in possession, who is only lessee at will to the mortgagor.

THIS was a writ of entry to foreclose a mortgage, brought on the 18th day of March last past. It counted upon the seisin of one *David Greenough*, who, on the first day of September 1820,

mortgaged the same to *Martha*, the wife of the demandant, and another person since deceased, and alleged an ouster by the defendants. The defendant, *Mrs. Gibbs*, made no defence. The defendant, *Kelly*, pleaded a special plea in abatement, that *Mrs. Gibbs* was tenant of the freehold, and on the 3d of November 1828 leased the same to him for one year, and that he had continued tenant at will under her, paying rent from quarter to quarter, ever since the expiration of the same year, and that he had nothing in the premises, and that the fee and freehold were at the commencement of the suit, and ever since, in *Mrs. Gibbs*. The prayer of the plea was, that the writ might be quashed as to him, *Kelly*, and for his costs. To this plea, the demandant demurred, and there was a joinder in demurrer.

The cause was argued by *Aylwin*, for the demandant, and by *Osgood*, for the defendant, *Kelly*.

STORY J. I give no opinion upon the exactness or regularity of the pleadings in this case, though they might be open to observation, because the parties have at the argument put the case upon the single point, whether *Kelly*, as tenant at will, is liable to be sued in the present action. It is true, that the defendant has suggested, that he has principally in view the question, whether he is liable to pay rent to the demandant since the commencement of the suit, he having paid it up to the 19th of April last. But that point cannot arise in this case, for no rent is recoverable in the present form of action. Where the rent has been paid to the mortgagor, or any person claiming under him, without objection by the mortgagee, the doctrine of Lord *Mansfield*, in *Keech vs. Hall*, (*Douglas R.* 21,) might be deemed applicable. But that is the less necessary to consider, because in *Wilder vs. Houghton*, (1 *Pick. R.* 87,) the Supreme Court of *Massachusetts* have held, that a mortgagee cannot maintain an action for mesne profits for the time elapsed after the commencement of his suit, and before his obtaining possession in an action to foreclose the mort-

gage. This was thought by the Court, to be a necessary result from our statuteable provisions on the subject of mortgages.¹

It is well known, that writs of entry to foreclose mortgages according to our local practice are not governed by the strict doctrines of the common law, applicable to writs of entry. Our statutes have necessarily introduced some modifications of the principles and practice under the writ, when brought to enforce a mortgage. The judgment is not a general judgment for possession, but is a conditional judgment, that the demandant shall have a writ of possession, unless the tenant shall pay the amount of the mortgage money with interest, within two months after judgment.

The present point appears to me closed in by authority. I do not advert to the doctrine in ejectment, that a tenant under the mortgagor may be at any time displaced, and his estate ended by the mortgagee at his will, and without any prior notice to quit. That is sufficiently established in *Keech vs. Hall*, (*Douglas R.* 21;) *Thunder d. Weaver vs. Belcher*, (3 *East*, 449.) Here the point raised by the pleadings is, whether a tenant in possession, not seised of the freehold, but holding as lessee under the tenant of the freehold, can be sued in this action. Now, it was expressly decided in *Keith vs Swan*, (11 *Mass. R.* 216,) that any person in possession of the mortgaged premises is liable to the action of the mortgagee. In that case, the defendant, who raised the question, asserted himself in his plea, to be tenant at will to the tenant of the freehold. It is, therefore, directly in point. It is true, that the case as to another point, viz., that non-tenure cannot be pleaded except in abatement, has been since overruled,² whether for reasons entirely satisfactory it is unnecessary for me now to say, though the Supreme Court of the *United States* have adhered to it, as will be seen in *Green vs. Lister*, (8 *Cranch*, 229.) But as to the main point, it has not

¹ See *Bigelow's Digest*, (2d edition,) note of the editor, p. 526.

² *Otis vs. Warren*, 14 *Mass. R.* 239.

only been overruled, but expressly affirmed in the later case of *Penniman vs. Hollis*, (13 *Mass. R.* 429, 430.)³

The point then is entirely at rest upon the authorities under our local law. But upon principle, I should have arrived at the same result, and I concur entirely in the reasoning, upon which those authorities have proceeded.

The plea must therefore be overruled, and a *respondeas ouster* awarded.

**THE SCHOONER TILTON,
SCHENCK, McCABE, AND SMITH, CLAIMANTS.**

The admiralty has jurisdiction over petitory as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession.

The admiralty has jurisdiction in case of a wrecked ship, to decree a sale upon application of the master.

The master of a ship has not, in virtue of his office, any authority to sell a ship, except in cases of extreme necessity, where the vessel is wrecked, or unnavigable, &c.

If he sells without such necessity, the sale is invalid, notwithstanding he has acted with good faith, at least, where the contest is between the owner and the purchaser.

Quare, how it would be between the underwriter on a policy, and the owner?

A wreck sale, made by authority of the statute laws of a State, is valid to pass the title to the property, where there is no owner or agent present to protect or claim the property.

Construction of the laws of *North Carolina* on this subject. A sale at the solicitation or order of the master is not a statute sale under those laws, binding the owner.

A statute sale, if fraudulent, will not bind the owner, unless in favour of a *bonâ fide* purchaser, for a valuable consideration, without notice, actual or constructive, of the fraud.

What is such notice?

The sale by an Admiralty Court of a wrecked ship, upon the application of the master and a survey made, is within its jurisdiction, but is not conclusive upon the owner or upon third persons.

THIS was a libel, brought originally in the District Court by *George W. Otis & Jonathan Thaxter*, of *Boston*, to obtain pos-

³ See also *Fitchburg C. M. Corporation vs. Melven*, 15 *Mass. R.* 268.

The Schooner *Tilton*.

session of three quarter parts of the schooner *Tilton*, alleging that they were the owners of the said three quarter parts, and that possession thereof was wrongfully withheld from them by the said *Schenck, McCabe, & Smith*. The claim and answer set up a title by purchase, in *McCabe & Smith*, to three quarter parts, and in *Schenck*, to one quarter, and set forth the facts connected with the sale and purchase. The replication denied the validity of the sale.

The principal facts were as follows :

The schooner sailed from *New York* on the 18th of May 1828, in ballast, bound to *Conwaysborough*, in the state of *North Carolina* ; three quarter parts of her being owned by the libellants, *Otis & Thaxter*, and the remaining quarter part by *Samuel Tilton*, the master. In the course of the night of the nineteenth, she was stranded upon the beach near the banks of *Chickamacomico* ; the next morning, *Tilton* made his protest before a notary public, and applied to a wreck commissioner, who examined the situation of the schooner, and at the solicitation of *Tilton*, advertised her to be sold on the thirty-first of the same month. At the instigation of *Tilton* also, a survey was had on her by three persons appointed by the notary, who, on the day of the sale and a few hours previous thereto, reported that the schooner ought to be sold, where she lay, for the benefit of all concerned. She was accordingly sold on the thirty-first, as advertised, by *O'Neil*, the wreck master, and was bid off by one *Pharaoh Farrow*, for the sum of \$196.50. She was afterwards floated by persons employed by *Farrow*, and taken to a neighbouring harbour, where she lay about a month, during which time the master, *Tilton*, came on to *Boston*, and claimed his insurance ; and after his return to *Chickamacomico*, she was taken to the port of *Washington*, in *North Carolina*, *Tilton*, *Farrow*, and *O'Neil*, going in her, where, on the 21st of July, *Farrow* conveyed one half part of her to *Tilton*, and a quarter part to *O'Neil* ; the considerations expressed in the bills of sale corresponding with the sum paid for

The Schooner *Tilton*.

the schooner by him, and he conveying only such title as he derived from the sale by the wreck commissioner, *O'Neil*. She was then registered at the custom-house as the property of *Farrow*, *Tilton*, and *O'Neil*. On the same day, *Farrow* and *O'Neil* conveyed three quarter parts to *McCabe & Smith*, for \$400 each; the bills of sale expressly excluding any warranty, further than for such title as they acquired by the bill of sale of the wreck commissioner. On the 12th of the following month of August, *Tilton* also conveyed his half part to *McCabe & Smith*, for about \$1050. And on the same day, *McCabe & Smith* conveyed one quarter part to *Schenck*, and appointed him master. A coasting license was afterwards taken out for the schooner, and she was repaired, and sent with a cargo to *Boston*, where she was seized by the libellants on the ground, that the sale made on the beach was altogether unnecessary, illegal, and collusive, and that they had, therefore, never been divested of their interest in the schooner.

The case was argued by *Charles G. Loring*, for the libellants, and by *David A. Simmons*, for the claimants.

STORY J. This is a libel in a proceeding in the Admiralty, technically called a cause of possession, the object of which is to restore to the rightful owner the possession of a ship, which is unlawfully withheld from him, or of which he has been wrongfully dispossessed. It is well known to those, who are conversant with the original elements of the jurisdiction exercised by the Courts of Admiralty, that it extended its claims to all causes of a maritime nature, inclusive of questions of prize, whether they arose from contracts or from torts, the nature of the contract deciding the point of jurisdiction in the former cases, and for the most part the locality of the tort in the latter cases. This subject was a good deal considered by me at an early period of my judicial life, in the case of *De Lovio vs. Boit*, (2 *Gallis. R.* 398,) and I am not yet convinced, that the doctrines therein stated are unfounded

The Schooner Tilton.

in a just view of the intrinsic rights of the Admiralty, whatever may have been the measure dealt out to it with severe jealousy by the Courts of common law. *Godolphin*, in his *Treatise on the Admiralty*, lays it down, that its jurisdiction is clear in "all matters that concern owners and proprietors of ships as such";¹ and it is as broadly stated in *Clerke's Praxis*, (*tit.* 41,) which is a book of undoubted authority. Suits in the Admiralty, touching property in ships, are of two kinds; one called *petitory* suits, in which the mere title to the property is litigated, and sought to be enforced, independently of any possession, which has previously accompanied or sanctioned that title; the other called *possessory* suits, which seek to restore to the owner the possession, of which he had been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a *constat* of property.² Until a comparatively recent period, the Court of Admiralty exercised undisturbed jurisdiction over both classes of cases, as upon principle it is still entitled to do. Lord *Stowell*, in the case of the *Aurora*, (3 *Rob.* 133, 136,) adverting to this subject, expresses himself in language not to be misunderstood as to the matter of right. "It is well known," says he, "that it was formerly held for a very long time, and down to no very distant period to be within the jurisdiction of this Court to examine and to pronounce for the title of ships on questions of ownership. It was not until some time after the restoration, that it was informed by other Courts, that it belonged exclusively to them; since that time, it has been very cautious not to interfere at all in questions of this nature. Where the consideration of property arises incidentally, and in such a manner as is not disputed between the parties, the Court can hardly be said to judge on the matter of property, as being a matter of question." In the case of the

¹ *Godolphin* *Adm.* 43.—*Zouch. Adm.* 93 &c., 98 &c., 102 &c.

² 2 *Brown Civ. and Adm.* 113, 114, 117, 118, 397, 406, 430.

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Warrior, (2 *Dodson R.* 288,) he alludes to the same subject, in terms quite as direct. "It is certainly true," says he, "that this Court did formerly entertain questions of title to a much greater extent than it has been lately in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the restoration, however, it was informed by other Courts, that such matters were not properly cognizable here; and since that time it has been very abstemious in the interposition of its authority. The jurisdiction over causes of possession was still retained; and although the higher tribunals of the country denied the right of this Court to interfere in mere questions of disputed title, no intimation was ever given by them, that the Court must abandon its jurisdiction over causes of possession."

What his Lordship here states, as to the actual exercise of the jurisdiction in former times, is borne out by authorities.³ In respect to petitory suits, the jurisdiction has been silently abandoned in *England*, for a considerable length of time; but in respect to possessory suits, it is still upheld by a constant and free exercise. And if in such possessory suits a question strictly of mere property arises, especially if it be of a complicated nature, the Court ordinarily declines to interfere. But it does not always wholly abandon its ancient jurisdiction; and sometimes it will, in its discretion, retain the cause, and direct the question of title to be decided in some other tribunal, and mould its own decree according to the ultimate decision there. Lord *Stowell*, in the case of the *Pitt*, (1 *Hagg. Adm. R.* 240,) alluding to this subject, says, "The Court is certainly in the habit of transferring possession from the actual holder, sometimes by its own movement, some-

³ See *Clerke's Praxis*, tit. 41.—*Radley vs. Egglefield*, 2 *Saund. R.* 259.—*Edmondson vs. Walker*, 1 *Show. R.* 172.—*Zouch. Adm.* 102.—*Godolp. Adm.* 31, 43, 44.—*Exton. Adm.* 71.—2 *Brown Civ. & Adm.* 114, 430.—*Haly vs. Goodson*, 2 *Meriv. R.* 77.

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times at the instance of other Courts, which have no direct powers for that purpose. But it considers itself bound to consider itself as moving within very narrow limits, *if it proceeds at all, originally upon a question of title*. It undoubtedly would not be inclined, in any case, to transfer a possession without regarding the title of the party, who claims the transfer. It must be satisfied, that he is *potior jure*; and it must be in cases extremely simple, that it acts on a merely preferable title to be reached by its own judgment.”⁴ Indeed, the Court of Admiralty in *England* considers itself, even in cases of possession, not merely as ministerial, but as having a large discretion or equity, and therefore entitled to refuse its interference, if it deems it inequitable or unjust. It will not hold an equitable title sufficient to justify its interposition against the legal title to restore possession; but it might, perhaps, sometimes deem such a title sufficient to restrain it from interfering with an existing possession under it.⁵

I am not aware, that this distinction between petitory and possessory suits (somewhat analogous to the distinction in actions respecting the realty between droitual and possessory suits) has in point of jurisdiction, ever been admitted into the actual practice of the Courts of the *United States*, sitting in Admiralty. It stands, as far as I have been able to trace it, upon no principle, unless it be, that titles to property derived from the common law, shall be no where litigated, except in the Courts of common law, a proposition, that, carried to its full extent, would prostrate the entire jurisdiction of the Admiralty in instance causes. Indeed, the titles to ships principally depend upon the maritime law, as recognised and enforced in the common law; and the Admiralty does little more in most instance causes, than to carry into effect the declarations of the maritime law, so recognised and enforced. No

⁴ See also *The Guardian*, 3 Rob. 93.—*The Aurora*, 3 Rob. 133.—*The Partridge*, 1 Hagg. Adm. 81.—*Ex parte Blanshard*, 2 Barn. & Cresw. 244.—*The Experimento*, 2 Dods. 38.—*The Warrior*, 2 Dods. R. 288.

⁵ *The Sisters*, 4 Rob. 287.—S. C. 5 Rob. 155.

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doubt exists, that the Admiralty possesses authority to decree restitution of ships wrongfully withheld from the owners.⁶ And if so, it ought to possess plenary jurisdiction over all the incidents. That was the clear opinion of Lord *Hale*, in *Radley vs. Egglefield*, (1 *Vent.* 173, 308,) which was afterwards confirmed by the whole Court; and it was there said, that when the Admiralty hath original cognizance of the principal matter, it hath also cognizance of the incidents thereto. The same case is reported in other books, and particularly in 2 *Saund. R.* 260, and 2 *Lev.* 25, where the doctrine is stated at large. It had been decided in the same way in the reign of Queen *Elizabeth*, (*Anon. Cro. Eliz.* 685,) and the doctrine is so reasonable in itself, that the difficulty is to conceive, how it could ever have been questioned. In the exercise of the prize jurisdiction, it has been constantly admitted to the largest extent.

In cases not strictly of prize, but partaking of their nature, as in cases of illegal captures in violation of our neutrality, the Courts of the *United States* have never hesitated to inquire into and decide the title, however complicated.⁷ In cases of salvage and bottomry, a like course has been adopted,⁸ as well as in cases of seizure for forfeitures.⁹ But what is still more directly applicable, in cases of marine torts the Supreme Court has gone at large into the question of proprietary interest, and has moulded its final decree according to the ultimate rights established by the parties. *Rose vs. Himely*, (4 *Cranch*, 241,) is an instance full of intricate and perplexing inquiries on this very point of title.

⁶ In *Ex parte Blanshard*, 2 *Barn. & Cresw.* 244.

⁷ See *Talbot vs. Jansen*, 3 *Dall.* 133.—*Del Col vs. Arnold*, 3 *Dall.* 343.—*L'Invincible*, 1 *Wheat. R.* 257.—*The Alerta*, 9 *Cranch*, 359.—*The Neustra Senora de la Caridad*, 4 *Wheat. R.* 497.—*The Antelope*, 10 *Wheat.* 66.—*The Santa Maria*, 7 *Wheat. R.* 490.

⁸ *The Mary Ford*, 3 *Dall.* 188.—*The Adventure*, 8 *Cranch*, 221.—*The Blaireau*, 2 *Cranch*, 240.

⁹ *The Mars*, 8 *Cranch*, 417.—*The Plattsburg*, 10 *Wheat.* 133.—*The Antelope*, 10 *Wheat.* 66.—11 *Wheat. R.* 413.—12 *Wheat. R.* 546.

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For myself, meaning to speak with all due deference for the judgment of others, I feel bound to confess my inability to perceive any sound distinction, as to the point of jurisdiction, between petitory and possessory suits. If there were a series of *American* decisions on the subject, which in point of authority ought to control my judgment, I should cheerfully bow to them. But finding none, I adhere to the doctrine, that the Admiralty possesses a rightful jurisdiction over both.* In cases like that before the Court, I do not find, that Lord *Stowell* has felt himself absolutely constrained to abandon all jurisdiction in *England*, because a title arose under a sale of a ship by the master, upon the ground of necessity.¹⁰ In the case of the *Warrior*, (2 *Dodson* R. 288,) he explicitly denied, that the Court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties, that there is a conflicting claim of title. One cannot, indeed, but feel the truth of the language of Lord *Tenterden*, that this jurisdiction of the Court of Admiralty is a most useful part of the jurisprudence of the country.¹¹ As such, I cannot but think, that it

* In the laws passed in the colony of *Virginia* in 1659, 1660, there is one declaring, that the governor and council shall "have full power and authority of a Court of Admiralty, to cognoss, determine, and administer justice in all things pertaining to sea-fairing, that shall appertaine, happen, or fall out within the jurisdiction of this collonie, either between mariner and merchant or mariner and master, as likewise all complaints, contracts, offences, pleas, exchanges, *assecurations*, debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of shippes, freights, hyres, and all other business among sea affairs done on the water, and when within the limits of the jurisdiction of *Virginia*, or the laws and cognizance thereof, with the cognition of writs, the causes and actions of reprisals, of letters of marque, to take stipulations, cognitions, and instructions."

¹⁰ See *The Partridge*, 1 Hagg. Adm. R. 81.—2 *Barn. & Cresw.* 244.—*The Pitt*, 1 Hagg. Adm. R. 240.—*The Experimento*, 2 *Dodson*, R. 41.—*The Warrior*, 2 *Dodson*, R. 288.

¹¹ In *Ex parte Blanchard*, 2 *Barn. & Cresw.* 244.

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ought not to be surrendered but upon principles too clear to admit of judicial doubt. My duty, therefore, compels me in this cause to travel over questions, which I would otherwise have gladly yielded up to other tribunals.

There is another point of no inconsiderable importance, upon which it is necessary to bestow some attention, before the Court proceeds to a more exact consideration of the facts. It is, how far the master of a ship, *virtute officii*, is clothed with authority to sell the ship. There is no pretence to say, that he possesses such an authority under the ordinary circumstances of the voyage. And the only question is, how far he possesses it in cases of extraordinary unforeseen emergency, acting *bonâ fide* for the interest of all concerned.

There appears to have been a good deal of reluctance on the part of the *British* Courts to admit such an authority in the master, even under circumstances of serious peril and difficulty. Lord *Hale* is supposed to have decided against it, in the case of *Tremenhere & Tresillian*, (1 *Sider.* 452,) which was referred to his decision. In *Johnson vs. Shippen*, (2 Lord *Raym.* 982,) Lord *Holt* used language, which has been construed to lead to a similar conclusion. I rather doubt, whether either of these cases justifies such an interpretation. There is a remark made in a very old reporter, (*Jenkins's Centuries*, case 16, note,) to a very different effect. It is there said, "The master of a ship in case of danger and extremity may cast the goods into the sea; and in some cases *sell the ship*, although it does not belong to him, as in case of famine," &c. Lord *Ellenborough*, however, as late as the case of *Hayman vs. Molton*, (5 *Esp. N. P. c.* 65, 1803,) laid down the doctrine with such unusual hesitation, that it is very expressive of his opinion of the then state of the law on that subject. "Where," said he, "a case of urgent necessity and extraordinary difficulty occurs, where a ship has received an irremediable injury, under such circumstances, the captain acting *bonâ fide* for the benefit of the owners, might sell the ship for the benefit of the

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owners. *This is the disposition of my mind, but I cannot lay it down as positive law.*" The case of *Reid vs. Darby*, (10 East R. 143,) had a tendency to throw still greater doubt over the whole matter, although it was finally disposed of upon another ground. To what is suggested in that case, as to the want of jurisdiction in the Admiralty Courts to decree the sale of a ship in a case of necessity upon an application of the master, I, for one, cannot assent. I agree, that in such a case the decree of sale is not conclusive upon the owner, or upon third persons, because it is made upon the application of the master, and not in an adverse proceeding. But I cannot but consider it as strictly within the Admiralty jurisdiction. It is *prima facie* evidence of a rightful exercise of authority, but no more. The proceeding, being *ex parte*, cannot be deemed conclusive in favour of the party promoting it. Upon a question of this sort I should incline to follow other authorities, and to repose with more confidence upon those, who are accustomed to administer the maritime law in Admiralty Courts. It does not appear to me, that Lord Stowell, with all his habitual caution in entertaining jurisdiction, has considered such a sale an absolute excess of judicial authority. Looking to the language used by him in the cases of the *Fanny & Elmira*, (*Edw. R.* 117,) and the *Warrior*, (2 *Dodson R.* 288, 293, 295,) I should draw the conclusion, that but for the controlling authority of the Courts, which he was bound to obey, he would have affirmed the jurisdiction.¹²

The doctrine of the Supreme Court of the *United States*, as I gather it from the case of *Janney vs. The Columbian Insurance Company*, (10 *Wheat. R.* 411, 418,) is, that this is properly a part of the Admiralty jurisdiction. Mr. Justice Johnson there said, in delivering the opinion of the Court, "In other parts of the world, it is very generally exercised as an incident to the ad-

¹² See also *The Lady Banks*, 1 *Hagg. Adm.* 306.—But see *Morris vs. Robinson*, 3 *Barn. & Cresw.* 196.—*Abbott on Shipping*, pt. 1, ch. 1, § 3, pp. 8, 11.—3 *Kent's Comm.* 95.

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miralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the *United States*;" and he intimated a clear opinion, that Congress might regulate the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction.

Shortly after the case of *Reid vs. Darby* was decided, the same question respecting the right of the master to sell in a case of necessity came before Lord *Stowell* for consideration; and that distinguished judge, with his accustomed felicity of reasoning, maintained the affirmative.¹³ In subsequent cases, his judgment appears to have reposed with confidence on the same decision.¹⁴

The doctrine in *England* seems at last, after a good deal of intermediate discussion, to have settled down in this result, that the master has an authority in a case of extreme necessity, acting with good faith and for the general benefit of all concerned, to sell the ship. That is the clear exposition of the law in *Idle vs. The Royal Exchange Insurance Company*, (8 *Taunt.* 755,) *Read vs. Bonham*, (3 *Bro. & Bing. R.* 147,) and *Robertson vs. Clarke*, (1 *Bing. R.* 445.) But at all events, as between the owner and the master, it is not sufficient that the sale be one of good faith on the part of the master, and for the benefit of all concerned, unless there be an urgent necessity.¹⁵ Whether the same rule applies as between the owner and the underwriter on a policy of insurance, admits of more doubt. Lord Chief Justice *Dallas*, in his elaborate judgment in *Idle vs. Royal Exchange Insurance Company*, (8 *Taunt. R.* 755,) strongly maintained, that in such a case it was sufficient to justify the sale, that there was good faith in the master, and that the sale was for the benefit of all concerned.¹⁶

¹³ *The Fanny & Elmira*, *Edwards's R.* 117.

¹⁴ *The Warrior*, 2 *Dodson R.* 288.—*The Pitt*, 1 *Hagg. Adm. R.* 240.

¹⁵ See *Read vs. Bonham*, 3 *Bro. & Bing. R.* 147.

¹⁶ *Ibid.*

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But that decision seems not to have been sustained, or at least not firmly established in more recent cases.¹⁷

The doctrine recognised in *America*, so far as it has fallen under my observation, substantially conforms to that in *England*, and limits the right of the master to sell to cases of urgent necessity. So it was held in *Gordon vs. Massachusetts Fire and Marine Insurance Company*, (2 Pick. R. 249,) and the like opinion may be deduced from cases in the *New York Reports*.¹⁸ My learned brother, the late lamented Mr. Justice *Washington*, in *Scull vs. Bridle*, (2 Wash. Cir. R. 150,) distinctly affirmed the right of the master to sell in a case of necessity, in a foreign country; but he thought it unjustifiable in the country, where the owner lives. This qualification of the rule seems to me not maintainable, where the necessity is clearly made out, though the circumstance, that the sale is in the country of the owner, may lead to very close watchfulness as to the degree of that necessity.

Without intending to commit myself in a case between the owner and underwriter, my judgment is, upon the most careful survey of the authorities, as well as upon general principles of law, that the master has a right to sell the ship in cases of urgent necessity. But at least, as between the owner and a purchaser at the sale, the title of the former is not divested, unless such necessity exists, notwithstanding the master may have acted with entire good faith, and in the exercise of a sound and honest discretion. I am happy to have the deliberate opinion of Mr. Chancellor *Kent*, in his learned Commentaries in support of this doctrine.¹⁹

It may be justly inferred, that the general maritime law, as recognised in foreign nations, is not more favourable to the power of

¹⁷ See *Robertson vs. Clarke*, 1 Bing. R. 445.—*Macburn vs. Leckie*, *Abbott on Shipping*, pt. 1, ch. 1, p. 6.—*Cannon vs. Macburn*, 1 Bing. R. 243.

¹⁸ *Fontaine vs. Phenix Ins. Com'y* 11 John. R. 293.—*Centre vs. American Ins. Com'y*, 7 Cowen, 564.

¹⁹ 3 *Kent's Comm.* 134.

the master. The *Consolato del Mare* (Art. 253) contains a provision permitting the master to sell the ship, if she becomes from age unseaworthy, and by parity of reason, on account of innavigability from any other cause. On the other hand, the laws of *Oleron*, the laws of *Wisbuy*, and the Commercial Ordinance of *Lewis* the Fourteenth, absolutely prohibit the sale of a ship by the master in all cases.²⁰ *Valin* sturdily contends for the policy of this prohibition, remarking, "Vocabulum enim istud, *maitre*, intelligendum est tantum de peritiâ in arte navigandi, non de dominio et proprietate navis;" and urging the general prevalence of fraudulent sales. The modern code of *France* contains a very proper exception of the case of innavigability of the ship; but subject to this, the modern law of *France* enforces the antecedent prohibition of the old law in an expressive manner.²¹

I adopt then the argument urged at the bar, that it must be proved, that there was a pressing necessity to justify the sale; and I go farther and hold, that if such necessity existed, the sale, to bind the owner, must be conducted with entire good faith, and must be *optima fide* and above exception.

And this leads me to the consideration of another topic, much discussed at the bar, how far the laws of *North Carolina*, on the subject of the sale of wrecked vessels, give validity to the title thus acquired. Those laws, as far as I have been able to collect their import from the statute book of the state, seem founded in a sound policy, and in furtherance of the principles of justice and humanity.²² They provide for the appointment of wreck commissioners in certain maritime districts, to assist vessels stranded, or in danger of being stranded. Where any vessel or other property is

²⁰ *Laws of Oleron*, art. 1.—*Laws of Wisbuy*, art. 13.—1 *Valin Comm. Lib. 2, tit. 1, art. 2*, p. 444.

²¹ *Code de France*, art. 237.—2 *Boulay Paty. Cours. Com. Droit* § 17, p. 85.—3 *Socre Esprit du Code Comm.* art. 237, p. 120.

²² *Acts of North Carolina*, 1801, ch. 599.—1805, ch. 689.—1817, ch. 953.—1818, ch. 975, of the authorized edition of 1821.

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cast ashore, "*without any person present to claim the same as owner,*" the commissioner is authorized to take possession of them and, under certain circumstances, to advertise them, and, if not claimed within twelve months, then to sell them. But if perishable, the same may be sold after public advertisement for a period not less than ten, nor more than twenty, days. The commissioners are punishable for any fraud or neglect of duty, and are required to give bonds for the faithful discharge of their duty. Provision is also made, that the commissioners shall be deemed proper officers to advertise and sell at public auction any cargoes, which may be stranded or cast on shore in their respective districts, "except the captain, owner, merchant or consignee shall choose to superintend such sale himself, or to remove the property without selling it." This latter provision presupposes the presence of the owner or his agent, and does not impart an original authority to the commissioners to sell *in invitum*; but clothes him with authority to act as auctioneer in cases of an implied or express assent of the owner, or his agent. The terms of the act confine the authority to the sale of *cargoes*; whether it has ever been extended by implication to ships, I do not know. It is most probable, that the omission to include ships was a *merē* mistake, originating in the very common imperfection of a careless and hasty legislation. But unless there were some judicial decision of the state tribunal to the contrary, I should consider the error one, which could not be supplied by the construction of a Court, extending the words beyond their import, but to be remedied by the act of the legislature. It is not material, however, to consider this point, because every sale made under this clause, must be considered as authorized by the owner or his agent; and consequently, it derives its force and validity from that circumstance, as a sale by *procuratio*. It is in no just sense a statute sale, where the act of the commissioner is conclusive upon third persons, *virtute officii*; but it is open to all the considerations belonging to all other sales, made at the instance of the parties in

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interest, by persons having a public authority to conduct sales. But where the sale is made by a wreck commissioner in cases falling within the language of the law, "without any person present to claim the same as owner," a very different interpretation ought, as I conceive, to be given to his act. He is there made, *virtute officii*, the agent of the owner for public purposes, and his authority to sell, if exercised in good faith, is conclusive to transfer the title to the property to any purchaser at the sale. No one can doubt the legal authority of a nation to provide for the transfer of property under circumstances, where there is no known owner to provide for its safety; and least of all ought such an authority to be questioned, where the property is of a perishable nature. I meddle not with the question how far any state in this Union can legislate, so as to interfere with the admiralty and maritime jurisdiction confided to the government of the *United States*, by the constitution. But subject to that consideration, the general authority would seem to be undeniable, as an attribute of sovereignty.²³ Such a sale, however, though generally conclusive upon the title of the owner, is so only in cases of good faith. A statute sale by a public officer may be impeached, as, indeed, more solemn acts may be, for fraud; and the purchaser can protect himself only by showing, that he is a *bonâ fide* holder, without notice of, or participation in, the fraud. *A fortiori*, a sale made by the consent of the owner or his agent, may be avoided for fraud.

The circumstances of the present case do not call upon the Court for a more minute expression of its opinion upon this point. But as a corollary from what has been said, it may be deduced, that the commissioner cannot, himself, become a purchaser, in whole or in part, at such a sale. He is a trustee, acting in a public capacity, and the law will not permit him to evade his own proper duties, or expose him to the temptation of a corrupt influ-

²³ See *Grant vs. M'Lachlin*, 4 Johns. R. 34.

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ence in conducting the sale, from motives of private interest. This is a salutary principle of public policy, and has been often applied with severe exactness to public as well as private trustees.²⁴ The same principle applies with quite as much if not more force to the master, when he acts as the agent of all concerned under an authority, superinduced by an urgent necessity in the course of a voyage. Under such circumstances, if he orders a sale, he cannot become a purchaser at the sale; and if he does, his title may be avoided at the election of the original owners.²⁵ There is, I admit, no positive disability on his own part, or on that of the wreck commissioner, to become a purchaser from the real purchaser, *after* the sale. But in such cases, there is a most suspicious watchfulness exercised on the part of the law, to search the transaction to the very bottom; and nothing but entire good faith, *uberrima fides*, on their part, will suffice to give validity to their title.²⁶

In the present case there is the less room to doubt as to the authority, under which the sale was actually made, because in the advertisement for the sale of the vessel by the wreck commissioner, it is expressly stated, that the sale was made "*by order of Capt. Tilton, late master, for the benefit of all concerned therein*;" and the bill of sale by the wreck commissioner to the asserted purchaser, also expressly states, that the vessel was exposed "*to public auction by the solicitation of*" &c. [the master.] This makes it very plain, that all parties understood it to be a voluntary sale, under the sanction of the master, and that the wreck commissioner derived his authority from that source.

²⁴ *Sugd. Vendors. ch. 14, § 2, p. 588, (17th edition) and cases there cited.*

²⁵ *Church vs. Mar. Ins. Com'y, 1 Mason R. 341.—Barker vs. Mar. Ins. Com'y, 2 Mason R. 369.—Copeland vs. Merc. Ins. Com'y, 6 Pick. R. 198.—Chamberlain vs. Harrod, 5 Greenleaf, 420.*

²⁶ *The Warrior, 2 Dods. R. 288.—The Fanny & Elmira, Edw. R. 120.—Hayman vs. Molton, 5 Esp. 65.*

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In this view of the matter, an objection has been suggested to my mind, though I do not remember, that it was insisted on at the bar. It is this, — If the master has an authority to sell in cases of necessity, he must still sell in the manner prescribed by law, as the agent of the owner, or his act will be void. If he sells as agent, the bill of sale must be in the name of his owners, and not in his own name. He cannot depute another person for this purpose; and even if he can, still that person must execute the bill of sale in the name and as the agent of the owner, and not in his own name. In the present case, the bill of sale was executed in his own name by the wreck commissioner, and not in the name of the master or owner. It is, therefore, in legal contemplation, a mere nullity, and cannot pass any title. Such is the objection, and there is a good deal in the case of *Reid vs. Darby*, (10 *East R.* 143,) which may be urged in support of it. But upon a full consideration of it, my opinion is, that, however justly it might apply in the case of *Read vs. Darby*, where the question was between *British* subjects under the *British* registry act, (as to which I decide nothing,) it is not generally applicable to cases of sales by necessity in a foreign country, where registry acts of a like strict nature do not exist, or bind the parties to the sale. It seems to me, that the agency of the master in cases of necessity, is an agency arising by operation of law. His power to sell is not derived so much from the supposed assent of the owner, as from the principles of law, to prevent a total loss of the property. The master acts, *virtute officii*, as master, and being in possession of the property, the law treats him as one capable of selling in his own name, but for the benefit of the owner. If any assent of the owner is to be presumed, it is an assent to sell in his own name in such cases, if that is, (as it is believed to be,) the usual, if not the invariable course. Foreign purchasers in a foreign country can have no knowledge of the persons, who are the real owners; or if they may have knowledge of those, who were owners at the commencement of the voyage, they can have no

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knowledge of any intermediate transfers by sale, by death, by bankruptcy, or by operation of law; and if no sale would be good, except made in the name of the persons, who were the real owners at the time, many of the purchases made in cases of sales of necessity would be liable to be avoided. Sales of all other property of the owners, except ships, made by the master in his own name, would be generally deemed sufficient to pass the title, if the sale were otherwise justifiable. Foreigners treat with him, as they do with factors in like cases, as owner *de facto*. My opinion, therefore, is, that in a case of sale, strictly of necessity, the master may give a sufficient title in his own name, as by operation of law substituted owner *pro hac vice*, or at least as an agent capable of passing the possession and property by a bill of sale executed in his own name. It is far from being universally true, that a person, who sells as agent, must always sell in the name of his principal in order to give validity to the transfer. A factor sells in his own name; an auctioneer commonly sells in his own name; and so a master selling perishable goods in cases of necessity, where he is not consignee; so a sheriff, where at common law he sells wrecked goods, which are perishable.⁷ If then the master might sell in his own name, and the sale is made with his privity and consent by a person, who usually gives a bill of sale, as wreck commissioner in his own name, it is clear to my mind, that the master is as much bound by such a sale so sanctioned by him, as if the bill of sale were in his own name. If the owner had authorized the wreck commissioner to sell, and give a bill of sale of his ship in his own name, would it be indured, that he should afterwards reclaim the property, because the bill of sale was not in his, the owner's, name? Would it not be deemed a perfect sale, binding him at law as well as in conscience and equity? I think it would, and that any other doctrine would encourage every sort of fraud upon innocent purchasers. If the

⁷ See 2 Inst. 168.

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owner will stand by, and see his own property sold, as the property of another, Courts of Equity have said, that he shall in many cases, for the suppression of fraud, be bound by it. And there are many cases even at law, where a party will not be allowed to set up his legal title against an innocent purchaser, where the owner has connived at the sale, or has acted fraudulently. But in a Court of Admiralty, which endeavours to regulate its doctrines by principles of equity, a party coming thither to seek redress, or to obtain possession of property, will not be permitted to avail himself of its jurisdiction, or authority, to defeat a clear equitable right by insisting on an inequitable legal right. The Court will withhold its interference in such a case. In this view of the objection, it would not be material, even if it had a better legal foundation than, I think, it really possesses. For, if the sale were necessary, and the transaction in all other respects *optimâ fide*, the defect of a legal execution of the papers would not entitle the owner to a decree of possession.

Having discussed the legal principles applicable to cases of this nature, let us now see, what is the real posture of the facts in the present case. The schooner *Tilton* belonged to *Boston*, and was owned by the libellants and the master, (Capt. *Samuel Tilton*;) the former owning three quarters, and the latter one quarter of her. She was duly enrolled and licensed at *Boston* for the coasting trade, and sailed from *New York* on the 18th of May 1828, bound to *Conwayborough*, in the state of *North Carolina*, on a contract to take in freight there. On the night between the 19th and 20th of the same month, she was, by the perils of the sea, stranded on the coast of *North Carolina* upon a beach or sand-bank, part of the bank of *Chickimacomico*. On the morning of the next day the master and crew got ashore, and the master, upon consulting some of the inhabitants, there being a small fishing settlement in the neighbourhood, concluded to apply to the wreck commissioner appointed by the government, for that part of the coast, and to authorize him to sell the vessel, as she lay on the bank. She

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was accordingly advertised by the wreck commissioner for sale on the 31st of May, and was sold on that day for the sum of \$196,50, including all her tackle, apparel, and furniture. A survey was made on her on the day of sale, and not before. The sale was conducted by the wreck commissioner, and the nominal purchaser at the sale was one *Pharaoh Farrow*, to whom a bill of sale was given by and in the name of the wreck commissioner, dated on the same day. It recites the original enrolment, and contains a special warranty, warranting the title "according to his authority as commissioner of wrecks," against all persons. The sale was made between 12 and 2 o'clock of the day. It is admitted, that on the same day, *after* the sale, the wreck commissioner purchased one quarter, and the master (*Tilton*,) one half of the vessel, at the price she was bid off at, and immediately afterwards, *Farrow* departed, and the wreck commissioner and *Tilton* (the master), and the mate, (the rest of the crew having been dismissed a few days before,) and about eight or ten other persons, hired for the occasion, went to work to endeavour to get the vessel off, and the wind and tide favouring, she was accordingly got off that night; and her leaks being stopped, she was carried by the master and other persons through *Ockracocke Inlet*, and brought to anchor in *Pamlico Sound*, on the inner side of *Chickimacomico* banks, where she remained for about one month. In the intermediate time, and before the vessel left *Chickimacomico*, Capt. *Tilton* returned to *Boston*, there being an insurance there upon the vessel for the benefit of all the owners, to the amount of \$3000, and he endeavoured to procure payment of his share of it; but the underwriters resisted payment upon the ground, as it is understood, that the abandonment was not good, it not being a case of a total loss. Capt. *Tilton* then returned by the way of *New York*, to *Chickimacomico*, and there (according to his own account, in a letter dated afterwards at *Washington*, on the 27th of July 1828,) he went on board of the schooner *Tilton*, and took her under his command to *Washington*, in the state of

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North Carolina, where she remained a short time, and underwent some repairs. While there, the original ship papers were deposited in the custom-house ; and on the 21st of July 1828, *Farrow* executed a bill of sale, reciting the original *enrolment*, of one quarter of the schooner to the wreck commissioner, and another bill of sale with a like recital, of one half to *Tilton*, (the master,) pursuant to the original agreement with them on the day of sale, and for a proportional sum of the original purchase money. On the same day, *Farrow* procured the schooner to be registered in the custom-house at *Washington*, as the joint property of himself, the wreck commissioner, and *Tilton*. On the same day (the 21st of July,) the wreck commissioner, by a bill of sale of that date, reciting the *register*, and that *Tilton* was master, conveyed his one quarter part (for which he had given \$49.12½ only), to *McCabe & Smith*, (the claimants,) for \$400 ; and on the same day *Farrow*, by his bill of sale of the same date, reciting the *register*, conveyed to *McCabe & Smith*, his remaining quarter part, for \$400. *McCabe & Smith*, thus became the owners of one half of the vessel, and *Tilton* of the other half. It is also material to state, that the bills of sale from *Farrow* to the wreck commissioner, to *Tilton* and to *McCabe & Smith*, warranted the title in a special form only, “ against all and every person and persons whomsoever, as far as I can do by virtue of the title to the said schooner, vested in me by the bill of sale from the commissioner of wrecks, dated the 31st of May 1828, and no further.” The bill of sale from the wreck commissioner also, to *McCabe & Smith*, warranted the title “ so far as I can do by virtue of the title to said vessel, vested in me by bill of sale from *Pharaoh Farrow*, bearing date the 21st of July 1828, and no further.” On the 12th of August 1828, *Tilton* conveyed his one half of the schooner to *McCabe & Smith*, for \$1050, reciting in the bill of sale the *register*, and that he, *Tilton*, was then master ; and on the 23d of the same month, *McCabe & Smith*, by a bill of sale reciting the *register* and that *Tilton* was master,

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conveyed one quarter part to *Schenck*, (the other claimant) for the sum of \$500 dollars. These two last bills of sale from *Tilton*, and *McCabe & Smith*, contain general covenants of warranty to the vendees against all persons. It is under the conveyances thus set forth, that the present claimants assert their title to the entirety of the schooner. The schooner was on the same day duly enrolled and licensed for the coasting trade, and soon afterwards sailed from *Washington* for *Boston*, under the command of *Schenck*, and after her arrival there was arrested upon the admiralty process, by which she is now before this Court.

Such is the general outline of the facts, as they are presented in an historical order. And the questions growing out of them and the other proofs in the cause, which have been most acutely and elaborately discussed at the bar, are these. (1.) Was there in the present case any necessity, which would justify the master in making the sale. (2.) If there was, was the sale actually made *bonâ fide*, and without fraud by the master, or with his privity and consent. (3.) If not, are the present claimants entitled as *bonâ fide* purchasers for a valuable consideration without notice of the fraud, to be protected in their actual title under the sales made to them. If the first question is decided against the claimants, their title is at an end, for it is then the case of sale made by one possessing no competent authority. If on the other hand the sale was a sale of necessity, then if fraudulently made, it cannot avail the claimants, if they had notice of the fraud, or were fairly put upon inquiry by the nature of their title and the circumstances, under which they took it. If they are *bonâ fide* purchasers of the title without any notice, constructive or actual, of any fraud in the sale, then, upon the general principles of law, their title stands firm and purged of the fraud.

In the first place then, was this a case where an actual necessity existed for the sale, in the sense, which I have already endeavoured to explain in the former part of this opinion? It is material to state, that the *onus probandi* here rests on the claim-

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ants. They are to establish beyond any reasonable doubt, that there was such a necessity, otherwise their title never took effect. The libellants stand upon their original title, and until that is displaced by another, clearly proved, they may rest upon it. Now, upon the first blush of the case we have the fact, that the vessel was not fatally injured, but she was got off at the first effort seriously made for that purpose, and at a very trifling expense, and she did not sustain any great injury from the stranding. Considering the length of time she lay on the beach, and her exposure to the inroads of the sea, if it were as great as the witnesses testify, her injury during the period was marvellously small, and her preservation somewhat remarkable. I am aware, that there was a fortunate concurrence of favourable wind, and tide, and sea, at the time when she was actually gotten off; but looking to the tale told by the log-book, it is by no means certain, that if similar efforts had been previously made, they would not have been equally successful. The season of the year was mild and favourable; the means, at least for some strenuous efforts, were at hand; and at a comparatively small distance there were men and means without the hazard of great expense, which had in other cases been found ready and adequate and successful. I admit, that we are not in a case of this nature to look solely to the event. Cases have occurred (and they may again occur) of such utter hopelessness, that in point of reason and common sense, a sale would seem to be instantly required without any effort of relief; and yet by some extraordinary circumstances beyond the reach of human foresight, the property has been finally redeemed from the peril, and has survived the disaster. In such cases the sale is nevertheless justifiable, and binding upon all parties. But where the relief has been in fact procured by the application of ordinary means within reach, we have a right to expect, that the necessity for sale should be such as could not admit of any reasonable doubt or delay; that the master ought not in common prudence to have made any efforts, and that the preservation of the vessel is to be looked up

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on as a piece of good luck and rare fortune, rather than of superior judgment, or skill, or enterprise.

Now, in the present case, no effort was in fact made by the master to relieve the vessel, (for I lay aside his abortive attempt by hoisting the sails, when he had no adequate assistance on board,) from the first moment of stranding up to the time of the sale, a period of eleven days. The vessel was a valuable vessel, insured for \$3000, and certainly worth from \$2000 to \$2500. He was upon the coast of his own country, and not upon a barbarous or inhospitable foreign shore. He was within a short distance of several commercial ports, where supplies might have been obtained, or at least sought. Upon the very spot there were men enough to aid him in any reasonable efforts to get the vessel off, and at a reasonable price. It is not pretended, that the neighbouring population either did refuse, or would have refused any such service. They never were asked. And if they had refused, even if the laws of *North Carolina* on this subject had slumbered, there were men at no great distance, who had been accustomed to such services. What advice the master took does not appear; or whether in reality he took any entitled to much weight. The wreck commissioner denies having given any advice to sell, and the notary, upon whom he seems to have relied, speaks pointedly to the danger of the vessel, but he does not seem to have been the leader of the plan of sale. If the master was of opinion, under existing circumstances, that it was best to sell; still as the sale was to be deferred for ten days, what was there in the meantime to prevent him from taking some steps and making some preparations to relieve the vessel, if a favourable time should occur? He could not but know, and so is all the testimony, that the vessel in her present state, if she could not be got off, would not sell for more than the value of her materials, of her sails and rigging and furniture, and there would not be any new hazard from the experiment. Every day's delay in the sale was adding something to the risk of getting the vessel off, and there

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was some motive therefore, to sell at once, or to attempt her relief. The weather, too, might at that season of the year be presumed to be favourable, and in point of fact during the intervening period it was so. But from the very first, the master declined all efforts, and he dismissed his crew before the sale, and remained in an utter state of inaction until roused after the sale was made. Let us put the question to ourselves, whether a master, honestly bent towards the interest of his owners, as well as his own, would, if the vessel had been uninsured, have conducted himself in this manner? The master's subsequent conduct was so disingenuous towards both the owners and underwriters, that it is somewhat difficult to escape from the conclusion, that he had some sinister motive at bottom. It is true, that his subsequent conduct ought not to prejudice the claimants, who were not parties to his acts, but it is impossible wholly to disentangle his acts from one another. Why should he have concealed, both from the owners and underwriters, his purchase after the sale?

Then, what was the state of the vessel? She was on a sand beach, buried, in part, in the sand, and accessible on one side at least to the tide. The amount of injury to her was not great. Some tree-nails are said to have been started, which, however, were easily replaced. It is said, that some of the planks of her bottom were started, and so it is stated in the protest; but that statement upon the whole evidence is, to say the least of it, extremely doubtful. It is not made out by evidence, *omni exceptione major*. It is encountered by opposing testimony, which is at least as disinterested, and of no inconsiderable positiveness, as well as weight. Her fore foot was off; but that was not very difficult to replace. She leaked considerably, and some oakum was started; but she was not unmanageable. What is decisive on this head is, that with some small repairs she reached *Boston*, and was there afterwards found by ship-wrights, who had repaired her but a short time before her disaster, very little hogged, and in their opinion nearly, if not quite, as strong and sound, as she was

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before the voyage. She has since performed a voyage with a heavy cargo, without complaining.

The survey, which, strangely enough, was not called until the day of sale, and therefore could have had no influence upon the master to sell, does not represent the injury to the vessel to be very serious. The surveyors say, that they found the vessel "high upon the beach with the larboard bilge much injured, and in all probability injured in the starboard bilge also, as that part lieth down in the sand, and therefore recommend Capt. *Tilton* to sell the vessel and materials." It is not a little remarkable, that the survey states no particulars of the injury, although in such instruments, it is usual, and important, to enumerate them at large. If by the bilge being "much injured," it was meant, that the bottom was broken in, or the timbers displaced, why was it not said so? There is no satisfactory proof, that the vessel was, in reality, bilged, in the nautical sense of the term. And there is some reason to believe, that the *North Carolina* testimony has incautiously, if not studiously, exaggerated the injuries from the stranding. The principal repairs at *Washington* seem to have been of no extraordinary a nature. The ship-wright, who repaired her, states, "that he there hove her down, examined and repaired her; he found many of her tree-nails in the bottom started an inch or more; her fore foot all off; the oakum in her seams somewhat started; her keel hogged about six inches; one of the channel benches was carried away, and her tiller was broken. The vessel appeared to him to be very strongly built, and to have undergone a great deal of hardship by chafing of her planks, and the starting of her tree-nails. He in repairing her had to drive many spikes into her bottom, better to secure where her tree-nails had been started." Another witness (*Whittier*) adds, she had a new mainmast put in, and was graved and repaired. Neither of them states, that any plank in the bottom was started.

But the statement of the injury and repairs, even as thus exhibited by the ship-wright at *Washington*, is brought into serious

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question by the testimony of the witnesses, who afterward examined and repaired her at *Boston*. The result of that testimony is, that the planks and tree-nails could not have been started in the manner stated ; that the planks of the bottom were not chafed, or the seams caulked ; and that there was no hogging of the vessel beyond what ordinarily belongs to vessels of her age and size. They admit however, that there was a new fore-foot. I do not say, that this last testimony is more worthy of credit than the former ; but such a conflict necessarily diminishes the confidence, which the Court would otherwise repose in the former. It leaves behind it a lingering suspicion, that there has been some effort to exaggerate the injury to the vessel, or some want of caution in the recollection of the witnesses.

Then, as to the local position of the vessel. She was certainly on a very dangerous and exposed shore, and open to the rake and full violence of the sea in an easterly storm. It is also in proof, that a large majority of vessels stranded on that coast are not got off, or at least are not got off, until after they are sold. The banks too are thinly inhabited ; and it is not too much to presume, that the inhabitants have an interest to discourage efforts to get them off, if not to obstruct such efforts. But the vessel was undoubtedly safe in her position, unless an easterly storm came on. There is no evidence, which establishes, that she might not have been got off by proper means. On the contrary, the general concurrence of the testimony is, that she might have been relieved by getting her on ways and launching, but not in any other manner. Nevertheless, she was got off in a different manner, and by the use of her sails and shores. The expenses of an attempt to get her on ways, and launch her, do not appear to have been disproportionate to the object, or very great, and I cannot but think, that under all the circumstances, the master ought to have resorted to it. The winds and the weather were not unfavourable for it. Why he did not make any such attempt is not satisfactorily explained, for it is not shown, that the means were

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not within his reach. One cannot but perceive, that being fully insured, he might not have any strong personal interest to stimulate his exertions. But on the other hand, the expenses of a trial, even if unsuccessful, must have been borne by the underwriters. The means to secure such expenses were in the hands of the master by a pledge of the materials, and by the lien given for such services by the general maritime law, even if the master could not, under the circumstances, have obtained funds upon the credit of the owners and underwriters.

The circumstances also attendant upon the sale are not such as would lead the Court to place implicit confidence in the master's judgment and character, either as to the necessity or good faith of the sale. The proceeds of the sale were \$196.50, a sum wholly disproportionate to the real value of the rigging and furniture, independent of the hull. The real value of the cables and anchors and other moveable materials could not have been less than \$500, and was in all probability more, if not upon the spot, at least in any neighbouring commercial port, to which they might have been transported. The master might have bid them in at the sale, for the benefit of the owners and underwriters, to whom they must have been far more valuable. It is difficult to see, why he did not, unless he had some private sinister interest. He and the wreck commissioner became confessedly purchasers on the same day, immediately after the sale, of three quarters of the vessel; and *Farrow*, the nominal purchaser, then disappeared, and did not again connect himself actively with the vessel or her fate, until after she arrived at *Washington*. As soon as the purchase is made, the master and wreck commissioner begin their efforts to get her off, nay the efforts seem to have been begun before, and in a few hours their success is complete. The master returns to *Boston*, and studiously conceals from the other owners, as well as from the underwriters, that he had acquired any new or superior interest under the sale, nay, affirming that he had no interest in the purchase of the vessel under the sale. Failing to

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obtain payment of the insurance, he returned to *North Carolina*, and there took command of the vessel, then lying in *Pamptico Sound*. Although he and the wreck commissioner had purchased on the day of sale, they had no title from *Farrow* until the time (21st July) when it became necessary to change the papers at the custom-house, at *Washington*. For aught that appears in the case, up to this period a profound silence had been observed by all the parties as to the interest of the master, if not of the wreck commissioner. The latter appears as owner, only for the purpose of disposing of his share to the first purchaser he can meet. The vessel was sold at *Washington*, without repairs, for \$1850, and of this sum the wreck commissioner received \$400, and the master \$1050.

It is said, that there is no proof that the sale was fraudulent, or that the master or wreck commissioner had made any bargain before the sale with *Farrow*; and that they are not by law prohibited from becoming sub-purchasers after the sale. Admitting that there is no absolute disability on their part to become sub-purchasers after the sale, still, in a transaction like the present, they must disprove their antecedent connexion with the sale in the fullest and most unqualified manner. The presumption of law is against them. The presumption of fact, in the absence of all controlling circumstances, is almost irresistible. It is for the furtherance of common justice and good faith, that persons in their situation should be compelled to purge themselves from every imputation of fraud, before they are permitted to derive any interest in trust property, which they undertake to sell, and which they may be tempted to sacrifice. In the present case it appears to me, that the interest of the owners and underwriters was wholly sacrificed. In respect to the master, acting as an agent for all concerned, I have very great doubts, whether he could become a purchaser at all without an option in his employers to take the beneficial interest to themselves.²⁸ Lord Stowell

²⁸ See *Chamberlain vs. Harrod*, 6 Greenleaf R. 420.

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in the case of *The Fanny & Elmira*, (*Edw. R.* 117, 120,) said, "The fact that the master afterwards became a subordinate purchaser under the purchaser at the sale, of one fourth part of the vessel, and at the price, which he himself had given for her, smells rank of collusion." The same circumstances occur here in a stronger form, and the subsequent conduct of the master and of the other parties to the sale fortifies every unfavourable conclusion. They could scarcely be ignorant of his motives for his return to *Boston*, or of his intentional concealment of the transactions at the sale, and immediately succeeding it. They connived at it, if they did not participate in it. Their subsequent conduct has no tendency to disarm suspicion. If every thing was in entire good faith, why should the bill of sale to the wreck commissioner and the master have been withheld until after the master's return from *Boston*; and why did *Farrow* and the commissioner then sell with special warranty, referring back to the wreck sale? If the master's conduct was honest, why should he have scrupled to receive a special warranty from *Farrow*, and have required some urging and argument to take it? Why should he have written such a disengenuous letter to the owners, under the date of the 27th of July, disguising and concealing all the material facts?

I cannot admit that there is no proof of fraud in the sale. On the contrary, it seems to me difficult to avoid the conclusion, that the facts of the case afford very strong presumptions of fraud. And these presumptions go farther, and cast a shade over the other parts of the case. They bear with no inconsiderable force upon the question of the necessity of sale, for if there was a fraudulent combination at the sale, it is easy to see, that means could be found to make out the necessity. Fraud, therefore, in such a case, is not to be treated as an independent fact, but as a fact, which travels along with the transaction in all its stages, to justify doubts, and to withdraw confidence.

There are many other topics, which have been adverted to by the counsel on each side, to sustain or defeat the defence. I do

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not go over them, because whatever may be their influence, either jointly or separately considered, they do not materially affect the conclusions, to which my mind has arrived.

The claimants have failed to satisfy my mind, that the sale was one of necessity, and still more so, that such as it was, it was a sale free from fraud. In the former view, the title of the claimants wholly fails, whatever may be their innocence or want of knowledge of the defects of title. In the latter view, it would be necessary to show, that they had notice of these defects.

I acquit the claimants of all connexion with any fraud, or participation in it. I do not doubt, that they are *bonâ fide* purchasers. But I am not satisfied, that they had not constructive notice of all the defects of title, at least so far as to put them upon inquiry. In the first place, they purchased with a full knowledge of all the antecedent history of the vessel. The ship's papers then in the custom-house, and recited in their own title deeds, showed, who were the original owners, and that *Tilton* was part owner and master. The other papers showed the manner and consideration of the wreck sale, and the purchase of the wreck commissioner and the master for a proportionate sum of the original price ; and this long after the vessel was sold at *Washington*. They showed, that *Tilton* was still master, and claimed to be owner of one half of the vessel, under a sale made by his own order and solicitation. They showed that the master was personally a great gainer by the sale. Their own title deeds also referred them to all the other papers, and pointed out the fact, that the other sub-purchasers stood upon a special warranty, and they were contented to take from them a special warranty. It is well known, that the general custom is to give a general warranty, and any exception naturally excites suspicion, and implies doubt. The party, who accepts such a title, is presumed to inquire into and to take the chances of any defect upon himself. It has been suggested, that *McCabe & Smith* never examined the bills of sale, and were ignorant of the fact of a special warranty. But, how

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can this be made out? The bills of sale were so drawn by the deputy collector, according to the instructions of one of the parties; and the deputy admits, that he never knew of a case of special warranty before. It was not then an unadvised act of the scrivener. The bargain was made before the parties came to him, and therefore he knows not what had previously passed in respect to this subject. But surely, it cannot be permitted to a party to set up ignorance of the contents of a bill of sale executed in his presence, and under which he asserts his title. The law presumes, that he has read it, or that he knows what its contents ought to be. It is not now pretended, that the vendors meant to give bills of sale with a different warranty. There was no mistake on their part, and there is no evidence, that *McCabe & Smith* contracted for a different title. When they subsequently purchased of the master his half of the vessel, they took a bill of sale with *general* warranty, and this precaution is not without its weight in giving a construction to the former special warranty, which could scarcely have passed without the observation of all the parties in interest, after it had attracted the attention of the master.

It appears to me then, that *McCabe & Smith* do not stand in the situation of parties, who purchase without knowledge of the actual derivation of title. They had the means of knowing all the material facts, and they ought to have exercised reasonable diligence in searching the transaction to the bottom. *Prima facie*, the title was suspicious and infirm. It was a sale by a wreck commissioner, who immediately became a purchaser, under authority of a master, who also became a purchaser at the price given at the original sale.

Upon the whole, looking to all the circumstances of the case, and having weighed the arguments of counsel with due care, my opinion is, that the sale was invalid, and conveyed no title to the claimants, and that therefore the decree of the District Court, ought to be affirmed.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1830, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN PITMAN, District Judge.

JOSEPH THURSTON vs. JOSEPH MARTIN.

Trespass lies against a collector of taxes, for imprisoning a party who is taxed as an inhabitant of a town, if he is not an inhabitant; for the assessors have no right to tax a person not an inhabitant; and if they do, it is an excess of jurisdiction. A new trial will not be granted on account of excessive damages, unless the jury have mistaken the principles of law, which ought to regulate damages, or have been guilty of some gross error, which shows an improper feeling or bias on their part.

THIS was an action of trespass for false imprisonment, brought against the defendant, who was collector of taxes for the town of *Newport, R. I.* The defendant pleaded not guilty, with leave to give special matter in evidence.

At the trial it was proved, that the defendant had arrested and imprisoned the plaintiff for the non-payment of a town tax, assessed on him for the year 1827, and that he was discharged upon payment of the tax. The real controversy at the trial turned upon the point, whether the plaintiff was an inhabitant of *Newport*, and so liable to be assessed for taxes there. It appeared in evidence, that the plaintiff was born in *Newport*, and had lived

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there until the year 1815 or 1816, and that his mother still resides there. In 1815 or 1816, being then of age, he went to reside as a trader at *Georgetown, South Carolina*, and from that time to the time of the suit he had continued his occupation there. He usually went to *Georgetown* every autumn in October, and remained there until June, and kept a store or shop of goods there, and performed such patrol and other duty as was required of him there, and paid taxes there. The sickly season coming on in June, he came northward every year at that time, and usually passed his summers and autumn until October at *Newport*, making purchases at the northward, principally for sale at *Georgetown*. It is usual for the inhabitants, during the sickly season, to leave *Georgetown* for the north, and return back in the manner the plaintiff did. The plaintiff is a single man, and has no family. Several of the inhabitants of *Newport* are in the habit of keeping shops of goods in *Georgetown*, and going there in the autumn and returning in June, at the time when the sickly season comes on, and of paying taxes at *Georgetown*. Some of these have families at *Newport*, and consider it as their home. The plaintiff was first taxed in *Newport*, after his removal in 1816. For one or two years the tax, being small, was paid by the plaintiff. He afterwards objected; and in some years the tax was remitted, and in some years he was not taxed. He resisted payment of taxes for several years before 1827, and refused performance of military duty as an inhabitant of *Newport*; and being sued for a militia fine was successful in his defence, setting up his non-inhabitancy as a defence. From the time of his first removal to *Georgetown* in 1815 or 1816, he never acted in any public business as an inhabitant of *Newport*; and for the last ten years he had constantly spoken of himself in public and private, as an inhabitant of *Georgetown*. These were the principal facts upon which the question of domicil turned at the trial.

The Court instructed the jury, that if upon the whole facts they were of opinion, that the domicil of the plaintiff was at *George-*

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town, he was entitled to recover in this form of action, and such damages should be given as the jury thought a fair compensation for the loss and injury to the plaintiff; but it was not a case for vindictive damages. The jury found a verdict for the plaintiff for \$505.

Hazard and Randolph, for the defendant, moved for a new trial; (1.) because the damages were excessive; (2.) because trespass could not lie against the defendant, who was a mere ministerial officer in collecting the tax.

Pearce and Turner, è contra, for the plaintiff.

The authorities and reasoning of the counsel are fully stated in the opinion of the Court, and it is unnecessary to repeat them.

STORY J. The motion for a new trial is founded upon two grounds; first, of excessive damages; and secondly, that an action of trespass does not lie against the defendant, who is a mere ministerial officer, for collecting the tax.

The first question may be disposed of in a few words. The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied, if the amount had been less. The charge of the Court directed the jury, if they found for the plaintiff, not to give vindictive damages; but to give (if the jury thought proper) such a compensation as would indemnify the plaintiff for the necessary expenses incurred in the suit, beyond what he would receive in the shape of costs. The jury were, however, left at liberty to consider all the circumstances of the case, which might, in their opinion, enhance the right to damages, such as the arrest and imprisonment.

It is one thing for a Court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. The Court in setting aside a verdict for excessive damages, should clearly see, that they are excessive; that there has been a gross error; that there has been a mistake of the

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principles, upon which the damages have been estimated ; or some improper motives, or feelings, or bias, which has influenced the minds of the jury. If the verdict be not subjected to some such imputations, it is not the practice of the Court to disturb the verdict. It is an exercise of sound discretion, which in some degree interferes with the conclusiveness of verdicts, and ought not to be resorted to except in clear cases. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict, as the jury found it. The doctrine of adjudged cases seems to me to support this view of the matter, and it instructs us to be very slow in listening to applications of this sort.

Now, I cannot say, judicially speaking, that the damages, taking all the circumstances together, are excessive, though they are larger than I should have given. The arrest and imprisonment, and the nature of the contest between the town and the plaintiff, as to the right to tax him, compelled him, after other efforts were exhausted, to resort for a vindication of his rights to a suit. He had been harassed from year to year by taxes, and no disposition, notwithstanding a long continued struggle on his part to resist them, was evinced by the assessors, to relieve him from the burthen. The jury probably looked to this, and deemed the suit absolutely indispensable, and at the same time very onerous upon the party. Under these circumstances, I am not disposed to interfere with the verdict.

The other is a question of more importance. The general principle to be extracted from the authorities is this,—Where a mere ministerial officer acts under the authority of a Court, or other board or tribunal, of a limited jurisdiction, there if the act be beyond their jurisdiction, he is, or may be, liable in trespass. But where there is jurisdiction over the person and the subject matter, there he is not liable for any irregularity or mistake in the exercise of that jurisdiction. This was so decided upon full con-

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sideration in the case of the *Marshalsea*, (10 Co. R. 68 b. 76.) In that case (which was trespass), a writ of execution had issued against the plaintiff, as bail, in a suit decided in the Court of the *Marshalsea*, upon which he was arrested and imprisoned. The defendants pleaded the judgment and execution in their defence, and the plaintiff replied, that neither the plaintiff nor the defendant in the original suit were servants of the king. And upon demurrer it was holden a good replication, and that trespass well lay against the defendants. The doctrine of this case has never been departed from, though there may have been in some few cases a misapplication of it.¹

In relation to taxes, where a party has been illegally assessed, there are other authorities directly in point to establish that trespass lies. If the person taxed, or the subject matter of taxation, be not within the authority of the officers, who make the assessment, all subsequent proceedings by mere ministerial officers, under a warrant to enforce the tax, are deemed utterly void, the original assessment being *coram non judice*. The case of *Nichols vs. Walker*, (Cro. Car. 394,) was trespass brought by an inhabitant of one parish, who was rated in another, not being liable to be rated there. The rate was allowed by two justices of the peace, in the manner prescribed by law; and upon a warrant by three justices, the goods of the plaintiff were distrained, and sold to pay the rate. Upon an exception taken, that trespass did not lie against the defendants, who were mere ministerial officers, acting under the warrant, the Court held, that the action was well brought, for the rate being unduly taxed, the warrant of the justices for the levy thereof will not excuse, for the justices have but a particular jurisdiction, to make warrant to relieve rates *well assessed*, and so the plaintiff had judgment. This case was fully

¹ Com. Dig. Imprisonment, H. 8, H. 9.—Id. Pleader, 3 M. 23, 24.—See also *Hill vs. Bateman*, 1 Str. R. 711.—*Shergold vs. Holloway*, 2 Str. 1002.—*Papillon vs. Buckner*, Hard. 478.—*Terry vs. Huntington*, Hard. 480.—*Perkins vs. Procter*, 2 Wils. 382.—*Brown vs. Compton*, 8 T. Rep. 424.—1 Chitty Plead. 183.

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recognised as sound law in *Perkins vs. Procter*, (2 *Wilson R.* 382, 384,) where the whole subject was most elaborately considered; And the cases of *Harrison vs. Bulcock*, (1 *H. Bl.* 68,) and *Williams vs. Pritchard*, (4 *T. R.* 2,) and *Mayor vs. Knowler*, (4 *Taunt. R.* 635,) Lord *Amherst vs. Lord Somers*, (2 *T. R.* 372,) silently proceed upon the admission of its correctness.

Thus far as to the *English* cases. In *America* the question has also been discussed. In *Martin vs. Mansfield*, (3 *Mass. R.* 419, 427,) the reporter states, that the Court strongly inclined, that trespass would not lie against a collector of taxes, where the party was not liable to be taxed. But I, having been counsel in the cause, have reason to know, that the reporter states the point too strongly. The Court did so incline until authorities were cited, which shook their opinion; but the assessors being responsible, it was thought unnecessary to argue the question of the liability of the collector, and his name was struck out by consent.* In later cases, however, the correctness of the *English* doctrine has been recognised. The general principle was acted on in *Albee vs. Ward*, (8 *Mass. R.* 79,) and it was largely commented on in *Colman vs. Anderson*, (10 *Mass. R.* 105, 119.)² In *New York*, the same question has undergone several adjudications. In *Henderson vs. Brown*, (1 *Caines R.* 92,) the whole Court admitted the soundness of the doctrine, that if the assessment were made upon a subject matter, not within the jurisdiction of the assessors, the whole proceedings by the collector were void under his war-

* In my own copy of the Reports, I find the following memorandum made in March 1809, upon page 427,—“This is too strongly stated. At first, the Court did so incline, but upon *Story's* citing several authorities, the opinion was shaken. But as the Court intimated a clear opinion upon the general question in favour of the plaintiff, recommended, to save time, by waiving the present incidental question, the parties consented to strike out the name of the collector.”

² See also *Dillingham, vs. Snow*, 5 *Mass. R.* 547, 559.—*Gage vs. Currier*, 4 *Pick. R.* 399.—*Inglee vs. Bosworth*, 5 *Pick. R.* 498.

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rant. But a majority of the Court in that case thought, that the property was liable to the assessment, though described in an improper manner. In *Suydam vs. Keys*, (13 *Johns. R.* 444,) the question arose in a form substantially like that now before the Court. Certain persons, not being inhabitants, were assessed for a school tax, which by law could be assessed only upon inhabitants. - The collector (against whom the suit was brought) had taken and sold the plaintiff's goods to pay the same. The Court held, that the action (trover) well lay against the defendant, because the plaintiffs were not taxable in any degree, nor under any modification.³ And in *Cable vs. Cooper*, (15 *Johns. R.* 152, 157,) the Court held, "that every tribunal, proceeding under special and limited powers, decides at its peril; and hence it is, that process issuing from a Court not having jurisdiction, is no protection to the Court, to the attorney, or the party, nor even to a ministerial officer, who innocently executes." A doctrine equally conclusive was held by the Supreme Court of the *United States*, in *Wise vs. Withers*, (3 *Cranch*, 331,) where it was decided, that trespass lay against a collector of militia fines, for taking the goods of the plaintiff to satisfy a fine imposed upon him by a Court Martial for non-performance of militia duty, and for which the collector had a warrant from the Court, the plaintiff, as a justice of the peace, not being liable to militia duty. The Court said, that the decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The Court and the officer are all trespassers. The only authority against this general current of opinion that I have met with, is, the case of *Beach vs. Furman*, (9 *Johns. R.* 229.) But that case, if it can be sustained as law, which may admit of question, proceeded upon the ground, that the parties acted under the authority of a person, who had jurisdiction in the case, and it admits,

³ See also *Wood vs. Peake*, 8 *Johns. R.* 69.—*Warner vs. Shed*, 10 *Johns. R.* 145.—*Smith vs. Shaw*, 12 *Johns. R.* 257.

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that if there were no jurisdiction, all the parties would be trespassers.

Looking therefore to the authorities, and to the principles upon which those authorities are founded, it appears to me very clear, that an action of trespass lies in the present case, unless there is something in the statute of *Rhode Island*, on the subject of taxes, which ought to vary the rule. Upon looking into that statute, (*Digest of 1822, p. 310,*) I cannot perceive any thing that ought to vary the general rule. The assessors are to assess and apportion the taxes upon the inhabitants of the town, or the rateable estates within the same. They have no authority to assess any person not being an inhabitant, and the jury have found, that the plaintiff was not an inhabitant at the time of the present assessment, or liable to any assessment. The assessment being made, they are to send a true bill or list thereof, to the town clerk, who is to deliver a true copy thereof to the town treasurer, who is to make out his warrant to the collectors of taxes to collect the same. The general course of the provisions on this subject, does not, in substance, differ from that of the other *New England* states. But the material consideration is, that the power of the assessors is limited and special. It is confined to inhabitants and rateable estates within the town. It follows, that if they assess persons not inhabitants, or estates not within the town, their jurisdiction is exceeded, and the proceedings, as to such persons and estates, are utterly void. If so, no justification can arise to any collector upon proceedings utterly void. The foundation failing, the superstructure must fall with it.

Upon the whole, I am of opinion, that the motion for a new trial ought to be overruled. The District Judge concurs in this opinion, and the motion for a new trial is, therefore, overruled, and judgment must be entered for the plaintiff according to the verdict.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1830, AT WISCASSET.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

SETH SPRING AND OTHERS

vs.

WILLIAM R. GRAY AND OTHERS, EXECUTORS OF
WILLIAM GRAY, DECEASED.

A special contract between ship-owners and a shipper of goods, to receive half profits in lieu of *freight* on the shipment for a foreign voyage, is not a case of merchants' accounts, within the exception of the statute of limitations.

THIS was an action of assumpsit. The declaration contained two counts. (1.) Indebitatus assumpsit, for balance of the account annexed to the declaration. (2.) Money had and received. The pleas were, (1.) Non-assumpsit, and issue thereon. (2.) Non assumpsit infra sex annos. (3.) Actio non accrevit infra sex annos. (4.) Non-assumpsit infra sex annos et triginta dies. (5.) Actio non accrevit in sex annos et triginta dies. Replication to the 2d, 3d, 4th and 5th pleas, that the accounts and promises in the declaration mentioned are and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors, and servants, &c. Rejoinder to the same pleas, that the accounts and promises in the declaration mentioned, are not, nor did they arise from such accounts as concern the trade of merchandise between merchant and merchant, as the plaintiffs in their replication have alleged, and of this the defendants put themselves upon the country. The plaintiffs joined the issue.

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At the trial, the whole evidence was applied to the account annexed to the declaration. The first item of the account was for a loss upon a policy of insurance, underwritten by the testator, for the plaintiffs. The Court having intimated, that such an item was not properly matter of account, it was abandoned by the counsel for the plaintiffs. The other items wholly respected the special contract hereinafter stated, and consisted of charges on the debit side of the account, and allowances on the credit side of the account, as will appear in the transcript below.*

* The account is as follows :

William Gray, Esq. of Boston, Merchant, in account with Seth Spring & Sons.

Dr.

1810. For loss sustained on the sloop <i>Francis</i> , Capt. <i>Sept. Ebenezer Jordon</i> , master, which said <i>Gray</i> insured,	\$ 2,500
1811. For 35,000 gallons olive oil in casks, delivered <i>Oct.</i> from barque <i>Morning Star</i> , <i>William Nason</i> , master, in <i>Boston</i> , at \$1,25 per gallon,	43,750
For 127 cases do. delivered by same,	1,270
For 53,803 lbs. cotton, left with <i>Mr. Lear</i> , in <i>Algiers</i> , and afterwards paid for by the Dey of <i>Algiers</i> , to Commodore <i>Stephen Decatur</i> , and received by said <i>Gray</i> , at 30 cts. per lb.	16,140 90
For cash paid by <i>Andrew M. Spring</i> , to <i>Bainbridge & Brown</i> , merchants, <i>England</i> , and by them placed to the credit of <i>Mr. Gray</i> ,	2,000
For cash paid <i>Andrew M. Spring's</i> commissions, 2 1-2 per ct. on said barque's outward cargo, as per agreement,	880
1829. Interest on loss on <i>Funny</i> , 19 years,	2,850
Interest on one half the profits of <i>Morning Star's</i> voyage, as per agreement,	14,758 41
	\$84,149 31

Cr.

1811. For amount of the outward cargo of the barque <i>Morning Star</i> , as per original invoice and bills of lading,	35,202 83
For his half the profits of said <i>Morning Star's</i> voyage,	14,469 03
1829. For balance now due from estate of said <i>William Gray</i> ,	34,477 45
	\$84,149 31

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The special contract arose as follows. In the year 1810, the firm of *Seth Spring & Sons*, consisting of the plaintiffs, and of *Andrew M. Spring*, since deceased, were owners of the barque *Morning Star*, of which *Andrew M. Spring* was then master. In May of that year, they entered into a contract with the testator for the shipment of certain goods belonging to the testator in the *Morning Star*; and in pursuance of that contract the following papers were executed by the parties.

“Shipped in good order, and well conditioned, by *William Gray* of *Boston*, a native citizen of the *United States of America*, for his sole account and risk, in and upon the barque called the *Morning Star*, whereof is master, for this present voyage, *Andrew M. Spring*, now in the harbour of *Boston*, and bound for *Algiers*. To say.” [The goods were here enumerated.]

“Being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned, at the aforesaid port of *Algiers*, (the danger of the seas only excepted,) unto *Andrew M. Spring*, or to his assigns, he or they paying freight for the said goods, as per agreement endorsed hereon, without primage and average. In witness whereof, the master of the said barque, hath affirmed to four bills of lading, of this tenor and date; one of which being accomplished, the other three to stand void.

ANDREW M. SPRING.

Dated in *Boston*, May 26th, 1810.”

Indorsed on this bill of lading, was the following memorandum :

“The proceeds of the within cargo, amounting to thirty-five thousand two hundred and two dollars eighty-three cents, as per invoice, cost, and charges, is to be invested in *Algiers*, or some other port, (after deducting all charges, consignee’s commission included, except freight, and premium of insurance; neither of which two last mentioned charges are to be made on the goods,) and returned in the said barque *Morning Star*, to *Boston*, where *Seth Spring & Sons* (owners of said barque) are to receive one half the net profits thereon, in lieu of freight and primage, the

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voyage round. The consignee's commission to be two and a half per cent on the sales of the within cargo. And no commission to be charged in *Boston*, except what is paid an auctioneer.

(Signed)

SETH SPRING & SONS.

WILLIAM GRAY.

Dollars, 35,202 $\frac{1}{2}$ $\frac{3}{4}$."

(Copy of instructions on a separate paper.)

" *Boston, May 26th, 1810.*

CAPT. ANDREW M. SPRING,

The cargo which I have shipped on board the barque *Morning Star*, under your command, you will proceed with to *Algiers*, and a market; there sell the same for the most it will fetch, and, after deducting the charges, (except freight and primage,) and two and a half per cent for your commissions, invest the net proceeds in brandy, wines, silks, and such other goods as are suitable for this market, if to be obtained: *ship the whole on board the barque, and return back to Boston directly. Upon your arrival here, the whole cargo is to be sold; out of which I am to receive the first cost of the cargo now on board, agreeable to invoice; and one half the profits for risque and interest money. The other half of the profits the owners of said barque are to have, for freight and primage on the cargoes out and home. There is to be no division of the cargo or profits, until the vessel returns, or the transaction is closed.*

Upon your arrival in *Algiers* apply to our consul, *Tobias Lear*, Esq. and take his advice; if he recommends it, sell the cargo, and invest the proceeds as above mentioned; otherwise, proceed to some other market, as *Mr. Lear* shall advise; and, as soon as you have completed the business, proceed direct for this port. In case any unforeseen accident should take place, which, upon fair calculation will, or may, prove, that it will be for our mutual interest for you to alter the voyage, you have liberty to do it.

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Annexed, you have a list of my correspondents, through whom you may forward your letters to me.

Committing you to Almighty Protection, and wishing you a prosperous voyage, I am your friend,

(Signed)

WILLIAM GRAY.

Received the original of the preceding instructions, which I promise strictly to observe and follow.

(Signed)

ANDREW M. SPRING."

The vessel sailed on the voyage, and arrived at *Algiers*. Part of the cargo was there sold, and the proceeds partly remitted to *London*, on account of *Gray*, and partly invested in oil on the return voyage, and delivered to *Gray*. The other part of the cargo was seized by the Dey of *Algiers*, and restitution of the amount of the value thereof was not received by *Gray* until 1817. The account was founded upon the transactions, as the plaintiffs considered them to be, at the final close of the adventure, and the receipts of all the proceeds by *Gray*. The particulars are not deemed important, farther than as they appear in the account annexed.

Upon the opening of the case by *Shepley*, for the plaintiffs, it was objected by *Nichols* and *Webster*, for the defendants, that the plaintiffs had not sustained their replication, and that the special contract and breach, so put in evidence, were not matters of account between merchant and merchant, within the purview of the statute.

In support of the objection, *Nichols* and *Webster* argued as follows :

To all the demands of the plaintiffs in this suit, we have pleaded, first, the general issue ; and secondly, the statute of limitations. To this second plea, the plaintiffs have replied, merchants' account, and upon this replication we are also at issue.

For the purpose of avoiding the labour of ascertaining, whether the defendants are at all indebted, or if indebted, to what extent, we move the Court, upon the second issue, to direct the jury,

that upon the plaintiffs' own showing, their cause of action is not excepted by the clause of the statute in respect to merchants' accounts.

It is admitted by the plaintiffs, that their claim is wholly founded on a contract of affreightment, endorsed on the bill of lading, which has been read. The question then is, whether this claim arises from "*such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants.*"

It is agreed, that there is no item of the plaintiffs' account within six years. And it is a grave question, whether there should not be some item within that time, even in the case of merchants' accounts, in order that they should be saved out of the general operation of the statute. The affirmative of this question is held in *England*, as appears by the case of *Barber vs. Barber*, (18 *Ves. jr.* 286;) and also in *New York*, in *Coster vs. Murray*, (5 *Johns. Ch. R.* 522.) It was decided otherwise, in the case of *Mandeville vs. Wilson*, (5 *Cranch*, 15.) But the point does not appear to have been at all discussed in that case; and we suppose that the Supreme Court of the *United States* would be still willing to consider it as an open question. We are aware, that in the Supreme Courts of *Massachusetts* and *Maine* the law is held in conformity with the decision in *Mandeville vs. Wilson*. *Bass vs. Bass*, (6 *Pick.* 362;) *Davis vs. Smith*, (4 *Greenl.* 339.) But in the case in *Greenleaf*, it was not the point before the Court; and in that in *Pickering*, the Court admits, that there is a great diversity of judicial opinion on the subject.

We do not, however, propose to discuss the point here; as we suppose, that this Court will feel bound by the opinion expressed by the Supreme Court of the *United States*, till it shall be reversed in the same Court.

Taking it then for granted, that it is not necessary, that any item of the plaintiffs' demands should be within six years; if in other respects they are within the exception of the statute, the question is, whether this exception is at all applicable to such demands.

In order to arrive at the true meaning of this clause of the statute, we should consider, what were the probable reasons, which influenced the legislature in enacting it. It is well known, that merchants, having mutual dealings, frequently suffer their accounts to remain open for a great length of time ; each anticipating further advances, by which the balance, from time to time, will be changed. It would be perfectly reasonable, that such accounts should not be considered within the general operation of the statute, upon the principle of there being a trust and confidence between the parties, that while the accounts remain open and unliquidated, no inference is to be drawn from the mere lapse of time, against the justice of the demands of either party.

It would seem, therefore, that the accounts referred to in the statute were open and current accounts between merchants, having dealings together as such ; and that there should be a chain of dealings, and not a single transaction, which, from the nature of the case, was to be settled without passing into an account. There must be a mutual and reciprocal credit given, a real mutuality and reciprocity existing in fact, and not merely in form.

The actual case is to be regarded, under whatever form it be presented. If there have been mutual advances of goods or money, these may form the basis of merchants' accounts, and be within the exception of the statute, however informally the accounts may have been kept. If, on the other hand, there is no reciprocity in fact, no ingenuity of a party in throwing his demand into the form of an account, will enable him to evade the operation of the statute. For every transaction may be stated in the form of an account of debtor and creditor, and this principle is the basis of the whole system of book-keeping by double entry.

The claim of the plaintiffs must be directly founded upon, and necessarily arise from, *accounts*. It must be a case, where, according to the old decisions, an action of account must be brought, or, according to the later decisions, an action of assumpsit, founded upon accounts.

In the next place we contend, that the exception in the statute applies only to "such accounts as concern the *trade of merchandise*." It must be a direct concern of trade ; as, where one person entrusts another with his property to merchandise with, and to account for the proceeds ; in which case, the person entrusted is bound, without any limitation of time, to render an account of the property. But whoever renders services to another, in respect to his property, in any other manner than in the way of trade or traffic, whether it be under a special contract or otherwise, he must bring his action for those services within the period prescribed by the statute, or his demand will be barred. If it be merely a contract by the owner of goods, to pay another for certain services in respect to the goods, whether for transporting them, insuring them, or laying out work and labour upon them in any way ; this is not the sort of trade which is contemplated by the statute.

These principles are supported by authority. - *Webber vs. Tivill*, (2 Saund. 124.) Declaration for goods sold, and *insimul computassent* ; held, that though the dealing between the parties concerned merchandise, and was between merchants, yet *that* was no reason, why it should be excepted out of the statute ; for if it should, by the same reason every contract between merchants would also be excepted, which was not the intention of the statute. *Accounts* between merchants only are excepted, and not contracts likewise. *Cotes vs. Harris*, (*Esp. N. P.* 14, *Bul. N. P.* 149.) The exception in respect to merchants' accounts applies only to cases of mutual accounts. This case is confirmed by that of *Cranch vs. Kirkman*, (*Peake N. P.* 121.) The following cases also support the doctrine, that the action must be *founded* upon *accounts* relating to the trade of merchandise, and that the accounts must be mutual ; *Ramschander vs. Hammond*, (2 Johns. 200 ;) *Coster et al. vs. Murray*, (5 Johns. Ch. R. 522 ;) *Murray in error vs. Coster*, (20 Johns. 576 ;) *Ingraham, Ex'r. vs. Sherard*, (17 Serg. & Rawle, 347 ;) *Fogger vs. Hodgdon*, (19 Vez. jr. 180.)

Let us try the present case by the foregoing rules. In the defendants' books, there is no account whatever between the parties. But the plaintiffs say, that in these books, an account is opened with the "adventure in the barque *Morning Star*;" in which the adventure is charged with all sums expended on account of it, and credited with the proceeds of the goods belonging to it; that the plaintiffs being entitled to half the profits of this adventure, they are interested in it as copartners, and that it is the same thing as if the account was with them directly; that in order to ascertain how much, if any thing, is due to the plaintiffs, it is necessary to go into a minute account of the voyage; and that, therefore, their claim is founded upon accounts between merchants relating to the trade of merchandise.

It is true, that Mr. Gray had in his books an account with this adventure. But he had a similar account with every other adventure belonging to him. This adventure was, at all times, Mr. Gray's sole property; and the mere circumstance, that he was to allow the plaintiffs half the profits in lieu of freight, did not give them an interest in the adventure as copartners, or afford any proof, that there were mutual accounts between the parties. As the account is stated in defendants' books, it is neither in form, nor substance, a mutual account between Gray and Spring; but an account between a part of Mr. Gray's sole property, and sundry other persons or accounts. It is merely a convenient mode of ascertaining a result; and this form is adopted, because no transaction can be recorded in a merchant's books, kept in the *Italian* mode, in any other form than that of an account. If a merchant buys a bale of goods for himself, which he pays for in cash, this transaction is stated in his ledger in the form of an account of debtor and creditor. So if he loses his goods by fire or otherwise, he states the loss in his books in the form of an account. But such transactions can, in no degree, be understood as relative to the subject of accounts between merchant and mer-

chant, so as to take the claim of any third person against him, on account of those goods, out of the statute of limitations.

If this mode of stating an account would bring the plaintiffs' demand within the exception of the statute, then the same transaction would be a merchant's account or otherwise, not according to the real state of facts, but according to the peculiar skill of the accountant.

But the plaintiffs say, that in *their* books there is a *current* account between the parties, in which Mr. Gray is credited with the cost of the goods shipped, and with half the profits of the voyage, and charged with the proceeds of the goods, by which a large balance is deduced in their favour. This, we say, is an incorrect mode of stating the account, inasmuch as it is admitted, that the whole claim rests on the contract of affreightment; so that the relation of debtor and creditor is confounded with that of bailor and bailee, and the party is charged and credited with his own goods. There is no mutuality of accounts in this case. Supposing, what we allege to be the fact, that instead of a profit, there had been a loss on the voyage; then, upon the principle of mutuality, the plaintiffs would be liable for their proportion of this loss. But to this, they would of course object, as being no part of their contract.

In the next place, we think it very clear, that the claim of the plaintiffs is not founded upon any accounts relating to the *trade of merchandise*. It is founded on a simple, and not uncommon contract of carriage, and on a single transaction. The demand is merely for freight. It was no part of the contract that the plaintiffs should *trade* with the goods, but simply carry them as bailees. This is no more a case of merchants' accounts relating to the trade of merchandise, than if it were a demand for an average loss by fire or other accident, under a policy of insurance. In that case, it might be necessary to go into a statement of accounts to ascertain the amount of the average. But that would not constitute such an account as is contemplated by the statute. It is

true, if the loss were adjusted, and the assured should charge the assurer by consent, with the liquidated amount in account current, this might form an item of merchants' accounts, if connected with other dealings in the way of trade, like an old balance carried forward into a new running account. But till the loss is adjusted, the claim is wholly under the specific contract in writing; and so here, the claim is wholly under the contract on the back of the bill of lading, and not upon any accounts in relation to the trade of merchandise. If the sum due upon this contract could be made the subject of merchants' accounts, the same might be done with a note of hand, or any other mercantile contract. It is well known, that merchants are in the habit of stating accounts in their ledgers with notes receivable. But it never occurred to any one, that such entries constituted accounts between merchant and merchant relating to the trade of merchandise, so as to save those notes from the operation of the statute.

The plaintiffs further contend, that they stand not only in the relation of carriers, but of consignees, or *factors*; for the goods are consigned to *Andrew M. Spring*, one of the parties, for sale, and the proceeds of the sale are to be re-invested and brought home to Mr. Gray, in the *Morning Star*; that consequently, the plaintiffs are accountable for the *sale* of the goods, as well as their transportation.

This we deny; for though *Andrew M. Spring* is consignee, it is by a totally separate contract from that of the plaintiffs as carriers, and a distinct compensation is to be paid to him in his separate capacity. The plaintiffs are, therefore, in no way answerable for his fidelity in this respect.

On the whole, we submit to the Court with great confidence, that both upon principle and authority, the claim of the plaintiffs is barred by the statute of limitations, and that there is no pretence for considering it within the exception as to merchants' accounts.

Shepley, for the plaintiffs, argued in reply :

The clause in the *Maine* statute, relied upon by the plaintiffs, is in these words : “ All actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants.” These words are an exact transcript from the statute of 21 *Jac.* 1, *ch.* 16. “ Such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,” are excepted out of the statute ; and the rights of the parties remain the same, as if the statute had not been enacted. At least, this would seem to be the decision of a mind, unbiassed by construction or authority. There is nothing in the language of the statute, that restrains the exception to accounts, that are not stated ; or to mutual accounts. They must be “ accounts” ; but it is quite certain, there may be accounts, which are confined to one of two parties interested in them ; and it is equally clear, that these accounts may “ concern the trade of merchandise.” Does the phrase, “ between merchant and merchant,” imply, that the accounts must be entered on the books of each, or that there must be debts and credits on each side ? May there not be dealings between merchant and merchant, and yet all the items of the dealings be on one side, in the account, or entry of them on books ? It is not admitted, that the exception, when freed from the pressure of constructive cases, requires, that there should be even more than one claim or item of account ; or that there should be any item within six years before action brought ; or that the accounts, or claims, or dealings, should be placed in books of so many lines of writing. It is sufficient, that there is an account, or item of account. The plural, “ accounts,” was not used to designate a plurality of claims in each case ; but because in designating the dealings, or claims, or accounts, between merchant and merchant, the plural is necessarily used to determine the character of the claim to be excepted. The account or claim must be between merchant and merchant, and must “ concern ” the

trade of merchandise. It is not necessary, that it should be for a sale or purchase of merchandise. It is enough, that it arises out of, or "concerns," the trade of merchandise. It may be any claim, which naturally and usually results from the trade of merchandise, because it will then "concern" it. Where is the foundation in the language of the statute for all the decisions declaring, that the accounts must not be stated accounts; and that they must be mutual accounts; and that some item must be within six years; but in the ingenuity of counsel, and of the Courts, in undertaking to determine what the statute should be, reasoning from the mischiefs, which they supposed the enacting power intended to remedy, instead of examining and deciding what the statute really was?

This mode of construing the statute of limitations in all its parts unfortunately commenced early; and continued to be acted upon until the statute was nearly repealed. The Supreme Court of the *United States* has been forward in restoring it; and the same mode of reasoning and of deciding, which nearly destroyed the whole statute, has greatly limited and impaired the exception relating to merchants' accounts; and the same course of reasoning and deciding, which restores the statute to its original meaning and vigour, will also restore the exception. And the exception should be as fully restored and relieved from the weight of authority, as the general provisions of the statute. Although it is believed, that such would be the legitimate construction of the statute, the plaintiffs' claim may be brought within the exception, as understood in the constructive cases. These cases are,

(1.) A class of cases deciding, that stated accounts are not within the exception. *Webber vs. Tivill*, (2 *Saund.* 122;) *Scudamore vs. White*, (1 *Vern.* 456;) *Chievly vs. Bond*, (4 *Mod.* 105;) *Welford vs. Liddel*, (2 *Vez.* 400;) *Farrington vs. Lee*, (2 *Mod.* 311.)

(2.) Another class decides, that the exception extends only to "mutual accounts" and "reciprocal demands." *Cotes vs.*

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Harris, (*Bul. N. P.* 149;) *Cranch* vs. *Kirkman*, (*Peake N. P.* 121;) *Catling* vs. *Skoulding*, (6 *T. R.* 189;) and *Ingraham* vs. *Sherrard*, and *Coster* vs. *Murray*, cited by opposite counsel.

(3.) The cases of *Catling* vs. *Skoulding*, and *Cranch* vs. *Kirkman*, decide also, that the exception extended to other persons' accounts, than merchants, although the words of the statute are expressly so limited; and although it had been before held to extend to none but merchants, in cases, *Sherman* vs. *Withers*, (*Chan. Cas.* 152;) *Farrington* vs. *Lee*, (1 *Mod.* 270.)

Having proceeded so far as to extend the exception to other accounts than those of merchants, it became necessary to place restrictions and limitations upon the exception; or the whole statute would, in effect, be repealed. There is, therefore, found,

(4.) Another class of cases having a tendency, more or less direct, to show, that there must be some item of account within six years before action brought, to bring them within the exception. *Welford* vs. *Liddel*, *Jones* vs. *Pengree*, (6 *Vez.* 580;) *Duff* vs. *East Ind. Com.* (15 *Vez.* 199;) *Barber* vs. *Barber*, (18 *Vez.* 286;) *Foster* vs. *Hodgson*, (19 *Vez.* 148;) *Union Bank* vs. *Knapp*, (3 *Pick.* 112.)

It will be difficult for any well balanced mind to examine the statute in the absence of all previous construction and authority, and find any ground whatever, for making a distinction between accounts partly more, and partly less, than six years standing; and all other accounts between merchant and merchant concerning the trade of merchandise. Such a construction introduces a limitation into the exception, almost as destructive of its original design, and as subversive of its language, as a class of repudiated cases has for a long time been, of the statute itself.

The Supreme Court, in *Mandeville* vs. *Wilson*, (5 *Cranch*, 18,) withstood this annihilation of the exception. And it has been followed by the Supreme Court of *Maine*, in *Davis* vs. *Smith*, (4 *Greenl.* 339;) and by the Supreme Court of *Massa-*

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chusetts, in *Bass vs. Bass*, (6 *Pick.* 362.) It is hoped, that the Courts, in restoring the statute, and relieving it from a load of constructive cases, will also restore the exception, and afford it a like relief. And, as the United States' Courts may be regarded as returning first from cases to common sense, in construing the statute, it may be hoped they will do the same for the exception now under examination.

The evidence introduced exhibits an account on the plaintiffs' books, crediting the deceased with the outward cargo, and charging the return cargo, with some other items. Mr. *Gray's* books do not charge the plaintiffs; but the charges are made, and credits given, under the name of adventure by the barque *Morning Star*. There is no item within six years. There is a special agreement as the basis of these accounts, out of which they arise. The evidence shows, that both parties were merchants; and if these are such accounts, as the statute contemplates, they are undoubtedly accounts between merchant and merchant, their factors, or servants. It is the subject matter, and not the form, of the accounts or claims, upon which the statute acts. If the subject matter is of a character to be aptly described under the term "accounts," it is sufficient to answer that part of the description. Now the subject in litigation here is the transportation of a cargo from this country to a foreign country; a disposition or sale of such cargo there; the investment of the proceeds in a return cargo; the re-shipment and return of that cargo; and a sale of it here, to ascertain the profits of the whole adventure. From such transactions, there must arise accounts; and such accounts as would seem to be within the exception of the statute; and such accounts as must be within the reasoning and policy, which occasioned the introduction of the exception. For it is obvious, from the disasters to which such adventures are subjected, that many years might elapse, before the final account of profit or loss could be made up. The evidence now introduced shows, that the accounts in this case could not have been settled for more

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than eight years after the contract; and the same causes might have postponed a settlement many years more. If these are accounts between merchant and merchant, are they not such accounts as "concern the trade of merchandise"?

The argument of the defendants is, that the accounts do not concern the trade of merchandise, but only the carriage or freight of merchandise. This is not admitted to be the proper construction of the contract. But suppose it were so, that the only obligation imposed upon the plaintiffs, was the carriage of the merchandise. Still, the contract contemplates the sale of the cargo; the re-investment of it, and the sale of the return cargo by some person, to accomplish the transaction. And until all this takes place, the accounts could not be made up; and the result could be obtained only by an examination of all the accounts arising from all these various transactions. The plaintiffs, therefore, had an interest in these accounts, by whomsoever they might be kept. They must have a right of examination into them. And if they were not to exercise any agency in the sales, the accounts of such sales must be accounts between the parties; and they would be accounts "concerning the trade of merchandise." And the words of the statute would include such accounts. They would still be accounts between merchant and merchant, and in which both would be interested to establish their rights, and would be accounts "concerning the trade of merchandise." If, therefore, the true construction of the contract does exclude the plaintiffs from all responsibility respecting the sale of the property, it does by no means follow, that the accounts, which arise out of the sale, as well as transportation of the cargo, and expenses upon it, may not be accounts "concerning the trade of merchandise."

Accounts between merchant and merchant, their factors or servants, may obviously be such as concern the trade of merchandise, and not arise out of sales or purchases. One merchant may employ another at a foreign port to receive goods, pay freights on them, enter and pay duties on them, reship them to another port,

pay wharfage, storage, insurance, &c. ; and his compensation for his services may be agreed to be, on the profits of the adventures. Can there be a doubt, that such accounts would be within the words of the statute, and within the spirit of it? And would they not be liable to great delay in their settlement, and be within the class of claims, for the protection of which the exception must be supposed to have been introduced? Merchants' accounts, as well as those of their factors, or servants, must, in the common transactions of business, be made up of many items and claims, which do not arise from the sale or purchase of merchandise ; and is the construction of the statute to be such, as would include in the exception a part of their accounts, and leave out other parts? Such a construction would ill accord with the liberal construction given to laws in relation to mercantile subjects. The contract is regarded as a mere contract of affreightment, by the defendants ; and *Andrew M. Spring* as consignee, and responsible to Mr. *Gray*, as such, under a different contract from that of *Seth Spring & Sons*. The plaintiffs regard the whole as one contract, both on the back and in the bill of lading, and consider the whole together, as carrying into effect the agreement between the parties. They consider one of the inducements to make the contract on the back, to have been, the employment of one of their firm to make the sales and purchases abroad ; together with the compensation to go to him as stipulated in the agreement, two and a half per cent commissions. "The proceeds of the cargo is to be invested in *Algiers*, or some other port," "and returned in the barque *Morning Star*, to *Boston*, where *Seth Spring & Sons* are to receive one half the net profits thereon, in lieu of freight and primage, the voyage round." "The consignee's commission, to be two and a half per cent on the sales of the within cargo." The consignee is bound by the agreement on the back of the bill of lading, and must act in obedience to it ; for he is a party to it, as one of the firm of *Seth Spring & Sons*.

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Acting under that agreement, and bound by it, signed by all the parties, he is an agent of all, and not of *Gray* only. The proper effect of all the papers being, to make him the common agent of all interested in the sale, and investment of the cargo. "The proceeds are to be invested" by whom? By him, who is appointed assignee by consent of all; by him, who is himself interested as a partner in one house, and who acts in the capacity of master of the vessel, and representative of that house, and consignee of the cargo. His accounts and proceedings are the accounts and proceedings of the parties themselves, who are interested in them.

If the transaction does not constitute a partnership, as respects this particular adventure, which the plaintiffs think may be the truth in relation to it, still it does constitute a joint interest in the sales, investment abroad, and final sales, and in all accounts arising out of them.

The accounts may be looked upon as accounts between a merchant and his factors or servants. The plaintiffs must have been as much interested in these accounts, as the servant of a mercantile house sent out to do its business in a foreign country, and having no interest in the property entrusted to him, other than the special property of a bailee; and such a servant's accounts seem to be within the exception in the statute.

In whatever light the accounts may be viewed, there will be found the same reasons for considering them within the exception on account of the risk, delay, and impracticability of an early settlement, as apply to the open accounts of sales of merchandise between merchant and merchant.

STORY J. The present case in the actual posture, in which it is presented to the Court, resolves itself purely into a question of law; and has, accordingly, been so argued by the parties. And I shall at once proceed to declare the opinion, which I have formed on the point, and if the parties are dissatisfied with it, it is

a great consolation to me, that the amount in controversy is sufficiently large to enable them to have it revised by the Supreme Court upon a bill of exceptions.

I own myself to be one of those, who consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose; the object of which, is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all the proper vouchers and evidences are lost, or the facts have become obscure, from the lapse of time, or the defective memory, or death, or removal of witnesses. The defence therefore, which it puts forth, is an honorable defence, which does not seek to avoid the payment of just claims and demands, admitted now to be due; but which encounters in the only practicable manner such, as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected, are unfounded, or at least, are no longer subsisting demands. And this presumption, the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their over confidence in regard to transactions, which have become dim by age. Yet I well remember the time, when Courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admissions of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation.

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It appears to me also, that it is the duty of the Court to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text. No exceptions ought to be made, unless they are found therein; and if there are any inconveniences or hardships growing out of such a construction, it is for the legislature, which is fully competent for that purpose, and not for the Court, to apply the proper remedy.

The statute of limitations of *Maine*, (1821, *ch.* 62,) enacts, that "all actions of account and upon the case, *other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants, &c.*, shall be commenced and sued, &c. within six years next after the cause of such actions and suits, and not after." The statute is pleaded in bar of the present suit, and the replication is, that it is a case of "merchants' accounts" within the exception, upon which the parties are at issue. And the question is, whether the facts prevent a case within the exception of merchants' accounts in the statute.

The *Maine* statute is a mere transcript on this head of that of 21 *Jac.* 1, *ch.* 16. Upon that statute, an early doubt arose, whether any other actions than actions of account were within the exception. The earliest decisions confined the exception to mere actions of account, which were at that time the common remedy for unsettled accounts. So it was held in *Farrington vs. Lee*, (1 *Mod.* 269, S. C. 2 *Mod.* 112,) and for a considerable time afterwards.¹ But the doctrine is now well established, that it applies to actions of assumpsit, as well as of account.²

The exception was undoubtedly made for the benefit of merchants, and probably had principally in view cases of foreign trade, carried on through the instrumentality of factors and agents;

¹ *Chevely vs. Bond*, *Carth.* 226.—S. C. 4 *Mod.* 105.—1 *Show.* 341.—*Martin vs. Delboe*, 1 *Mod.* 71.

² See 2 *Saund. R.* 125, &c. and notes.—6 & 7 of *Sergeant Williams*, *Peake N. P. C.* 164.—*Mandeville vs. Wilson*, 5 *Cranch*, 15.

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for there was at that time very little inland commerce in the kingdom of *England*. In the course of such transactions, accounts would naturally arise, which, from the distance of the parties, might remain unsettled for many years. In *Webber vs. Tivill*, (2 *Saund.* 125,) *Jones*, who argued for the defendant, and whose argument was adopted by the Court, said,—“ The reason was, because it often happens that merchants, who are *as partners*, or hold correspondence one with the other in several parts of the world, may have accounts current between them for several years before they have an opportunity of meeting to state their accounts, and therefore the statute does not mean to limit their accounts.”

Every part of the exception is equally material ; and it is not sufficient, that a plaintiff brings himself within one part of the description, if all parts are not applicable to him, in the predicament in which he stands before the Court. He must by his replication aver, that it is a case of accounts ; of accounts, which concern the trade of merchandise ; of accounts between merchant and merchant, their factors, or servants.

In the first place, it must be a case of accounts. The saving, as has been justly remarked long ago, is not of actions, but of accounts.³ The statute did not mean to except actions generally, between merchants, &c., but only such actions as respected accounts. This is the natural interpretation of the text, and it is confirmed by the preceding words ; for the action of account, out of which the exception is carved, is founded solely on cases lying in account. The case, therefore, must be such as is properly matter of account, and not any special contract, which the party may afterwards throw into the shape of an account. The action of account at the common law lay only against bailiffs, receivers, guardians, and partners in trade, and other persons standing in the like relation, who received goods, merchandises, monies, &c., of

³ *Webber vs. Tivill*, 2 *Saund.* 125.—1 *Mod. R.* 269, 270.

the other party, to render an account thereof. But it was never supposed, that a special contract, which might alternately require an examination of accounts, or might be pressed into that shape, was within the reach of the exception. We must understand the statute in its obvious sense, as saving accounts proper; that is, such as consist of debits and credits, properly arising in account, and not as saving all cases, where one man is accountable to another for his performance or non-performance of a special contract. That was so decided in *Chevely vs. Bond*, (*Carth.* 226,) where a suit was brought on a bill of exchange, and there was a replication, to a plea of the statute, of merchants' accounts. But the Court held, that bills of exchange for value received, are not such matters of accounts as are intended by the exception. The true object was to save such accounts only, for which an action of account would lie. It may be necessary in many cases, to make out an account, in order to decide a claim arising upon a contract; but that will not make it a matter of account. For instance, in ascertaining a partial loss, or average upon a policy of insurance, an account may be necessary; but no one supposes that would, as between the assured and the underwriter, constitute a case of "merchants' accounts" within the statute.

Then, under what circumstances does the exception apply to accounts? Does it apply to all matters properly and originally matters of account, without reference to the question, whether they have been stated, or closed, or are now open and current? The language of the statute is "accounts" generally, without any qualifying adjunct. But it has been held from the earliest times, that the exception does not apply to *stated* accounts. It was so decided in *Webber vs. Tivill*, (*2 Saund. R.* 125,) and that decision has never, on this point, been departed from.⁴ The ground of that decision was, that as soon as an account is stated,

⁴ See *Sandys vs. Bodwell*, *W. Jones*, 401.—*Martin vs. Delbo*, 1 *Sid.* 465, *S. C.* 1 *Mod.* 70.—1 *Vent.* 89.—1 *Lev.* 298.—*Farrington vs. Lee*, 2 *Mod.* 311, 312, *S. C.* 1 *Mod.* 268.—*Chevely vs. Bond*, 4 *Mod.* 105.

and a balance agreed, it becomes a dead debt; and for this an action of debt will lie; and by parity of reason, an action of assumpsit also. It may also be illustrated by considering, that where an account has been stated between the parties, an action of account no longer lies;⁵ for the defendant may then plead *quod plene computavit*; and yet it is plain, that the exception was intended to be carved out of cases, for which an action of account lies, otherwise it would be nugatory.

Then again, does the exception apply to accounts *closed*, or only to accounts *current*? It may be admitted, as was decided in the case of *Mandeville vs. Wilson*, (5 *Cranch R.* 15,) that an account closed by a cessation of dealings between the parties is not an account stated. But that does not dispose of the question; for it is still open to consideration, whether any but *current accounts* are within the exception. Upon this point the authorities, both in *England* and *America*, are not uniform. The decision in 5 *Cranch R.* 15, is, that the exception applies as well to *closed*, as to *current* accounts. That has been followed by the Supreme Court of *Massachusetts*, in *Bass vs. Bass*, (6 *Pick.* 362;) and of *Maine*, in *Davis vs. Smith*, (4 *Greenl.* 339.) But in an earlier case, *Union Bank vs. Knapp*, (3 *Pick. R.* 96, 112,) the former Court held a different opinion.⁶

In *Sherman vs. Sherman*, (2 *Vern.* 276, *S. C. Eq. Cas. Abridg.* 12,) it was agreed, that though lapse of time might be a bar to a bill in equity for an account long after all dealings had ceased between the parties;⁷ yet, that the statute of limitations was not pleadable, if it was a case of merchants' accounts. The same conclusion may be deduced from other early cases, though

⁵ *Com. Dig. Accompt E.* 3.—*Godfrey vs. Sanders*, 3 *Wils.* 73, 94.—*Fitz. N. B.* 117 and note (d.)

⁶ See also *Cogswell vs. Dollivar*, 2 *Mass. R.* 217, and 5 *Dane's Abridg.* ch. 161, art. 6, § 4, p. 395.

⁷ See also *Bridges vs. Mitchell*, *Bunb.* 217, *S. C. Gilb. Eq. R.* 217.—*Foster vs. Hodgson*, 19 *Vez.* 180.

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some of them probably turned upon other considerations.⁸ Lord *Hardwicke* seems at one time to have inclined to the same opinion ;⁹ but his deliberate judgment in *Welford vs. Liddel*, (2 *Vez.* 400,) was, that where all accounts have ceased for more than six years, the statute is a bar, and the exception applies only to accounts running within the six years ; and then the whole account is saved as to antecedent items. He there said, that the object of the exception was to prevent dividing the accounts between merchants, when there were running accounts unsettled. This last opinion appears to have become, since that time, the prevalent opinion in *England* ; and has been acted on by very eminent judges, not indeed without exception, for Lord *Kenyon* seems to have held a different doctrine ;¹⁰ but with such a weight of authority, as leaves little doubt, that it will be adhered to. I do not go over the cases. They are very ably collected by Mr. Chancellor *Kent*, in his judgment in *Coster vs. Murray*, (5 *Johns. ch.* 522.) I have travelled over the same ground, and find nothing to add to, or subtract from, his observations. His own conclusion was, that the statute is a bar in all cases, where the merchants' accounts are closed, and not running within six years. If this case turned upon the point now under consideration, my official judgment would be controlled by the local decisions already adverted to, in *Massachusetts* and *Maine* ; supported, as they are, by that of the Supreme Court of the *United States*. At the same time, I cannot but express a hope, that the question may be again re-examined, if it should ever be presented in any case from a state, where it is not yet fettered by any local authority. There is enough of doubt about it to justify an ample inquiry.¹¹

⁸ See *Sandys vs. Blodwell*, *W. Jones R.* 401.—*Martin vs. Delbo*, 1 *Lev.* 298, *S. C. Sid.* 465.—2 *Keble*, 674 696, 717.

⁹ See the case cited in 19 *Vez.* 185.

¹⁰ *Calling vs. Skoulding*, 6 *T. R.* 193.

¹¹ See *Astrey's case*, 2 *Freem, Ch. R.* 55.

Then, again, does the exception apply to cases of account, where the account is all on one side, or only to mutual accounts, or cases where there are mutual debits and credits? The doctrine of *Jones*, in *Webber vs. Tivill*, (2 *Saund. R.* 125,) was, that *accounts* between merchants only, (by which he meant mutual accounts,) and not *contracts* merely, were excepted; and his argument was adopted by the Court. In *Cotes vs. Harris*, (*Bul. N. P.* 149,) Mr. Justice *Denison* also held, that the exception extended only to mutual accounts and reciprocal demands. Mr. Chancellor *Kent*, in *Coster vs. Murray*, (5 *Johns. Ch. R.* 522,) adopted the same doctrine; and it was confirmed by the opinion of Mr. Chief Justice *Spencer*, in his well reasoned opinion in the same case upon the appeal, 20 *Johns. R.* 576, 582. The Supreme Court of *Pennsylvania*, have followed it in a very recent case.¹² There are, perhaps, some decisions admitting of a different interpretation; but the present case does not require an absolute opinion upon this point.¹³

The accounts must also be "such as concern the trade of merchandise," by the very terms of the statute. It is plain, therefore, that it does not cover all accounts. What are accounts, which concern the trade of *merchandise*? It seems to me, that they are such as concern traffic in merchandise, where there is a buying and selling of goods, and an account properly arising therefrom. Merchants may mutually buy and sell to each other, and mutual accounts may thus arise between them. Factors may buy and sell for the benefit of their principals; and thus may have debits and credits in account with them. Indeed, it is the common duty of factors and stewards to keep accounts, as well of what they receive, as of what they pay. That the exception applied only to the trade of merchandise was clearly the opinion of Lord *Hard-*

¹² *Ingraham vs. Sherard*, 17 *Serg. & Rowle*, 347.

¹³ See *Godfrey vs. Saunders*, 3 *Wilson R.* 94.—*Marston vs. Cleypole*, *Bunb.* 213.—*Martin vs. Delbo*, 1 *Lev.* 298.—*Siderf.* 465.

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wicke, in *Sturt vs. Mellish*, (2 *Atk.* 612,) where the transaction was not a buying or selling of merchandise, but the mere receipt by the defendant of monies, which he was authorized to receive from a foreign government. In *Bridges vs. Mitchell*, (*Bunb.* 217, *S. C. Gilb. Eq. R.* 224,) the Court strongly inclined to think, that accounts between partners were not within the exception, as partners do not deal as merchants with each other, but as one merchant with others. Whether this doctrine as to partners be correct or not, the case still shows, that the Court looked to the case of a traffic in merchandise, as the proper foundation of the account. In *Crawford vs. Liddel*, cited in 6 *Vez.* 583, where the bill prayed an account of transactions under a patent for extracting oil from tar, and a plea of the statute was put in with an averment, that they were not "merchants' accounts," Lord *Rosslyn* allowed the plea as good. Indeed, it seems impossible to extend the exception to any other accounts than those, which concern the trade of *merchandise*, or buying and selling goods, without a departure from the sense and import of the words, equivalent to an entire rejection of them.

There is yet another qualification in the exception, and that is, that the accounts must not only concern the trade of merchandise, but be "between merchant and merchant, their factors, or servants." Who is a merchant within the sense of the statute, it is not now necessary to consider,¹⁴ for the parties to the present suit are admitted to be merchants; and the question is, whether the present was a transaction between them as merchants, or as merchant and factor, coming within the other descriptive words of the exception.

It appears to me very clear, that the present transaction is not a case within the exception of the statute. It is not a case of ac-

¹⁴ See *Marston vs. Cleypole*, *Bunb.* 213.—*Bridges vs. Mitchell*, *Bunb.* 217.—*Sturt vs. Mellish*, 2 *Atk.* 612.—*Anon.* 2 *Freem. Ch. R.* 22.—*Murray vs. Coster*, 20 *Johns. R.* 576.—1 *Mod.* 270.—2 *Ch. Cas.* 132.—*Cranch vs. Kirkman*, *Peake N. P.* 164.—2 *Inst.* 379.

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counts concerning the trade of merchandise. The plaintiffs were not the owners of the goods sold ; but *Gray* was the sole owner. He was not their factor to sell or dispose of them. The goods were his own, and shipped on board of the vessel of the plaintiffs, who had no interest in them ; but were merely to be paid freight according to the ratio of the profits made upon the adventure. There was, as between the plaintiffs and *Gray*, no trade or traffic of merchandise ; but a mere special contract to receive half profits in lieu of freight. That *Gray* might be compelled to account to them for the half profits, so far as to ascertain the freight, does not bring the case within the exception. A mere bailiff may be compelled to account, and so a bailee, or depository ; but this does not bring the case within the exception. The matter to be accounted for must concern the traffic of merchandise between the parties. It must be a case, where there arise properly debits and credits between them, on sales, or purchases, of goods. Unless this limitation be adopted, the exception in the statute would cover all contracts, however special, between merchants, from which there might arise some accidental accountability on some pecuniary claim between them ; a doctrine, which has never yet been broached, and would be subversive of the leading objects of the statute, the security of all persons against stale demands. Upon a special contract, like the present, there is no ground to assert, that an action of account, at the common law, would lie ; for *Gray* was not chargeable either as bailiff, or as receiver of the goods or monies of the plaintiffs. What he received was for his own account. He was not even to pay any part of the money, received as half profits, to the plaintiffs. It was all his own. He was only liable upon his special contract, for a sum to be paid to the plaintiffs in lieu of freight, equal to the half profits. The half profits, as such, did not belong to the plaintiffs ; they were referred to only as a mode of ascertaining the amount of freight, which might become due.

It has been argued, that the plaintiffs and *Gray* were partners in the transaction, because they were to divide the profits. But it is clear, that no partnership was contemplated between them. They were not to divide the profits as such. But the profits were merely a mode of ascertaining the compensation for freight. And it has been often held, that such a case does not constitute a partnership.¹⁵

It has been argued, that the master, being the consignee of *Gray*, may be deemed a factor; and that all the plaintiffs are liable, as his co-factors or joint contractors, for his acts as factor. But the case is not so. The contract with the plaintiffs as ship-owners, for the shipment of the cargo on half profits in lieu of freight, did not bind them for the acts of *Andrew M. Spring*, as factor of *Gray*, although he was one of the owners. The contract between him and *Gray*, as consignee, was as distinct, as if he had not been a part owner or master of the vessel. The ship-owners, as such, are only liable for the acts of each other as ship-owners, and of the master, as master. If another character or agency is superinduced, the acts of the party in that character are *res inter alios acta*, and they are in no wise responsible therefor. The acts of *Andrew M. Spring*, as factor, did not affect the other plaintiffs with any responsibility, or create a privity with him in that character.

If the present case can be maintained as a case of accounts within the exception, then in all cases of special contract, where by any ingenuity an account may be raised, or where there may arise collaterally, any form of ultimate accountableness, all security from the statute is gone. The statute may be evaded at the option of the party. He has only to change, not the form of his remedy, but the form of his declaration, to declare upon an *indebitatus assumpsit* upon an account, instead of declaring spe-

¹⁵ *Go on Partnership*, 19, 20, &c.—*Rice vs. Austin*, 17 *Mass. R.* 197, 206.

cially in assumpsit upon the original contract, and the bar of the statute is demolished. In the present case, if the plaintiffs had declared in assumpsit upon the special contract according to the facts, the statute would have been a perfect bar to such a declaration; for, (as was justly observed by *Jones*, in the argument in *2 Saund. R.* 125,) the exception is not of *contracts*, but of *accounts*. By declaring in the shape of an indebitatus assumpsit, upon an account arising upon the very same contract, and the very same facts, according to the argument pressed upon the Court, the bar is defeated. Thus, the original contract is, or may be, extinguished, when it is specially set up as the foundation of a suit; and yet it will be deemed to subsist as a perfect title, when it is introduced collaterally, though it then constitutes the sole foundation of the suit. It will be dead in form and substance as a contract, but will revive in form and substance as an account.

If these difficulties could be overcome, (and to me they seem insuperable,) the other considerations above alluded to would be of very great weight. Here, the account, if any, was closed more than six years; it was not mutual; but all on one side. It was a single transaction, and open to all the objections, which weighed so strongly in *Coster vs. Murray*, (5 *Johns. Ch. R.* 522; 20 *Johns. R.* 576, 582.)

My judgment is, that the case established in evidence by the plaintiffs, is not sufficient to support the replication of merchants' accounts, and that the jury ought to find that issue for the defendants.

The District Judge concurs in this opinion, and a direction will therefore be given to the jury accordingly.

[The jury gave a verdict for the defendants upon the issue upon the replication; and gave no verdict upon the general issue, as it was thought unnecessary, the former amounting to a bar of the action.]

The Schooner Ruby.

THE SCHOONER RUBY, ASA WOODBERRY AND OTHERS,
CLAIMANTS.

The declarations and admissions of the original owners of a vessel, not a part of the *res gesta*, but containing a mere narrative or admission of pre-existent facts and occurrences, tending to establish a forfeiture, are not evidence against subsequent *bona fide* purchasers of the vessel.

Doubtful circumstances, which the original owners might explain, if claimants, do not press as heavily against *bona fide* purchasers, who are not presumed to be conversant of them.

THIS was a libel of seizure of the schooner *Ruby*, for an asserted forfeiture under the coasting act of 1793, *ch.* 52. The libel contained two counts, or allegations. The first alleged, that the *Ruby* being, in 1824, a vessel duly enrolled and licensed for the coasting trade, was engaged in *a trade other than that for which she was licensed*, (§ 32 ;) the second alleged, that while she was so licensed, she proceeded on a *foreign voyage*, without first giving up her enrolment and license, (§ 8.)

The claimants, in their claim and answer, asserted themselves to be *bona fide* purchasers of the *Ruby*, for a valuable consideration, without notice of any forfeiture, and denied the allegations of the libel.

A decree of acquittal was pronounced in the District Court, from which an appeal was taken by the *United States*, to the Circuit Court.

The cause was argued at this term upon the evidence taken by the parties, by *Shepley*, District Attorney, for the *United States*; and by *C. S. Daveis*, for the claimants. It turned principally upon questions of fact. There was much new testimony taken since the appeal.

STORY J., in delivering the opinion of the Court, observed,—This cause comes before the Court upon the claim of *bona fide* purchasers for a valuable consideration without notice, at a con-

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siderable distance of time, and after many intermediate voyages, since the asserted offences were perpetrated. Under such circumstances, the Court is in the habit of requiring somewhat stronger evidence to inflict the penalty of forfeiture, than it ordinarily does require, where the original owners are before the Court, who may be presumed to be conversant of all the transactions. If the evidence bears against the innocence of the vessel, and yet has some imperfections and infirmities, the case will stand less favourably in respect to the original owners, than in respect to *bonâ fide* purchasers; for the former have it in their power to explain many doubtful circumstances, of which the latter may be presumed to be in utter ignorance. Those circumstances, therefore, press less hardly against the latter, than the former. If the owners may explain, but do not, their silence of itself becomes significant. It affords a corroboration of all the unfavourable conclusions, which the actual posture of the evidence justifies. And in proportion as time has intervened since the asserted transgression, the difficulty of removing apparent incongruities is presumed to increase, since it throws into obscurity many of the means of explanation. Not to yield to such considerations on the part of the Court, would be to resist the ordinary results of human experience, to seek an occasion to inflict forfeitures, rather than to indulge those presumptions of innocence, which the law throws round the party for his protection against oppression and fraud.

There is another point, suggested by the circumstances attendant upon this case, which is of a good deal of practical importance, and may affect the security of the title of purchasers in no inconsiderable degree. The declarations, and oral admissions of the original owners, have been sprinkled by the testimony with a somewhat uncommon frequency over this record. The question is, how far such declarations and admissions as to past facts and occurrences are evidence against *bonâ fide* purchasers. It is obvious, that if these declarations and admissions are evidence

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against purchasers at all times, and in all circumstances, in the same manner and to the same extent, as if the original owners were now sole litigants before the Court, there can scarcely be any security to any derivative title. Purchasers will be in imminent peril, not only from offences, but from confession of offences, which may be imaginary and collusive, as well as real and true. On this subject, I am of opinion, that the rule of law is, that the declarations of the owners of the vessel, so far as they constitute a part of the *res gestæ*, at the time of the asserted offence, are evidence against all subsequent claimants. But declarations made after the *res gestæ* and constituting in no just sense a part thereof, or which contain a mere historical narrative or admission of pre-existing facts, although made by them while they were yet owners of the vessel, are not evidence against *bonâ fide* purchasers. In their nature they are mere hearsay, the declarations of third persons not under oath, and ought not to bind the rights or interests of innocent parties. I shall accordingly reject all that portion of the testimony, which states declarations or admissions of the original owners, not falling within the rule above stated.

Having disposed of these considerations, which present a view of legal principles, I shall now proceed to a review of the facts, keeping in mind the general doctrine, that this is not a case where by statutory regulations, the *onus probandi* is thrown upon the claimants.

[The judge here reviewed the evidence, and decided, that the forfeiture was not proved ; and he accordingly affirmed the decree of the District Court, but directed that a certificate be entered that there was reasonable cause of seizure.]

Decree affirmed

CIRCUIT COURT OF THE UNITED STATES

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1830, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Judge of the Supreme Court.
 { Hon. JOHN DAVIS, District Judge.

UNITED STATES *vs.* HENRY MOULTON.

Money and bank notes and coin are "personal goods," within the meaning of the sixteenth section of the crimes act of 1790, ch. 36, respecting stealing and purloining on the high seas.

INDICTMENT founded on the crimes act of 1790, *ch.* 36, § 16. It contained several counts. The first alleged, that the defendant, on the high seas, &c., *one piece of foreign gold coin*, called a sovereign, of the value of \$4,60; one other piece of foreign gold coin, called one eighth of a doubloon, of the value of \$2,00; one piece of foreign silver coin, called a seven pence half penny, of the value of 12½ cents; twelve pieces of foreign silver coin, called *Spanish* dollars, each of the value of \$1,00; one piece of silver coin of the *United States*, called a half dollar, of the value of 50 cents; twenty-four pieces of foreign silver coin, called quarters of a dollar, each the value of 25 cents; one other piece of foreign silver coin called a nine-pence, of the value of 12½ cents; one piece

of silver coin of the *United States*, called a quarter of a dollar, and of the value of 25 cents; *one bank bill of the New-Haven Bank*, of the denomination of five dollars, and of the value of \$5,00; *one other bank bill of the State Bank of Boston*, of the denomination of three dollars, and of the value of \$3,00; *one other bank bill of the bank of the United States*, of the denomination of five dollars, and of the value of \$5,00, of the personal goods of one *John L. Bowman*, did then and there feloniously take and carry away, with intent to steal and purloin, against the peace &c., and the form of the statute &c. The second count alleged the larceny to be of one piece of gold, of the value of &c.; one piece of silver, of the value &c.; enumerating the same coin as in the first count. There were two other counts, one of which was for a larceny of the foreign coin, and the other of the coin of the *United States*, in the first count mentioned.

The defendant pleaded guilty; and having no counsel, *Dunlap*, District Attorney, stated to the Court, that there was a question of law open upon the record, how far the coin and bank bills, or either of them, were "personal goods," within the purview of the statute.

Dunlap argued as follows:

The indictment contains four counts. In the first, the defendant is charged with stealing sundry pieces of coin, and three bank bills; in the second, with stealing sundry pieces of gold and silver not alleging them to be coin or money, of a certain alleged value; in the third, with stealing certain pieces of foreign gold and silver coin; and in the fourth, with stealing certain coin of the *United States*. In the second, third, and fourth counts, the property described is admitted to be the same as the coin described in the first count. The question is, whether these bank bills and this coin, or either of them, are "*personal goods*" within the true meaning of the statute of 1790, *ch.* 36, § 16, which prohibits and punishes the offence of taking and carrying away on the high seas, and in certain specified places under the sole and

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exclusive jurisdiction of the *United States*, with intent to steal or purloin, the "*personal goods* of another."

It is admitted, that there are various authorities in the *English* books; decisions made in *favorem vitæ*, on account of the anxieties of judges administering the bloody code of *Great Britain*, to find loops to hang doubts on, and which tend to show that bank notes and money are not *goods* and *chattels* in penal statutes. Some of the authorities are to be found referred to and examined in the case of the *United States vs. Davis*, (*ante*, 356,) where it was holden, that a larceny of a promissory note, a chose in action, was not within this act of congress, because not the "*personal goods* of another." To the authorities of *Jacob's Law Dictionary*, "*Goods*," "*Chattels*," *Co. Litt.* 118; *Com. Dig.* "*Biens*"; 2 *East P. C.* 587-948; 2 *Russell on Crimes*, 1093, may be added *Foster* 79, where it is said, that money is not within the act of 10 & 11 *W.* 3, against privately stealing *goods* in ware-houses, &c.; 2 *Strange*, 1133; 3 *Chitty on Criminal Law*, 946; *Dyer's Rep.* 5; 1 *Leach's Rep.* 52; *Leigh's & Grime's* cases decided in 1764, where it was holden, that dollars or *Portugal* money, and guineas, being *money*, were not "*goods, wares, and merchandise*," within the statute of 24 *Geo.* 2, *ch.* 45; 1 *Leach*, 241; *Guy's* case decided in 1782, where it was holden, that money is not within the meaning of the words *goods* and *chattels*, within the statutes of 3 *W. & M.*, *ch.* 9, § 4; 5 *Ann*, *ch.* 31, § 5, and *Davidson's* case contained in a note to *Guy's* case to the same effect decided in 1766; 1 *Leach*, 468, *Sadi* and *Morris's* case decided in 1787, where it was holden, that bank notes are not "*goods and chattels*" within the before mentioned statutes of *William & Mary* and *Ann*; 6 *Johns. R.* 103, where it was holden, that a larceny could not, at common law, be committed of a letter; and *Perry vs. Coates & Tr.* (9 *Mass. R.* 537,) where it was holden, that bank notes were not "*goods, effects, or credits*," within the statute of *Massachusetts*, respecting foreign attachments. These were the leading

authorities and cases in favour of the defendant and in support of the doubt, whether money and bank notes were "personal goods" within a penal statute.

It would be contended on the part of the *United States* with great confidence, that money and bank notes are "personal goods." Some aid might be derived from recurring to the various definitions of larceny, and it would be found, that the most ancient and modern definitions were the most broad and sensible. In *Bracton*, *Lib. 3, ch. 32*, it is said, "quod furtum est secundum leges contractatio rei alienæ fraudulenta, cum animo furando," the word is "*rei*," the most extensive in its signification; and the only word in the definition which shows, that it must be even *personal property* is the barbarous word "*contractatio*," a word, it is believed, unknown in the Latin language, implying that the thing stolen must be something which can be removed or taken and carried away. In the third *Institute*, 107, it is true, the definition is more strict, and the offence of larceny is described to be the "felonious and fraudulent taking and carrying away, by any man or woman, of the *meer personal goods* of another." In *2 East P. C. ch. 16, § 2*, the same expression, "mere personal goods," is preserved in the definition of larceny. But in a recent case, *Hammond's case*, *2 Leach*, 1089, a definition of larceny is given by *Grose J.* more conformable to the ancient definition in *Bracton*,—"the felonious taking of the *property* of another." Under the word "*rei*" in *Bracton*, and the word "*property*" in the modern definition, it would seem, that money and bank notes were included.

Money and bank notes are "personal goods." Things personal, according to *2 Black. Comm. ch. 24*, are things moveable, or which may be carried about with and attendant upon a man's person. Certainly, money and bank notes are of this description of property, and indeed money is expressly mentioned in this description, by *Blackstone*. A chose in action is said to be a thing not in occupation or enjoyment, but merely "a bare right,"

to be recovered by an action ; hence its name. But neither money, nor bank notes good and current, which are the representatives of specie, are choses in action. In form a bank note is a chose in action, and when dishonoured, it becomes the evidence of a right of action, a document for a debt ; and the case in 9 *Mass. R.* 537, was of dishonoured bank notes.

The suspicion of the necessity of a law-suit to enforce the payment of a bank note would destroy its currency, which is its essence, and gives it its character of money. While therefore it circulates, it is as money, and Lord *Mansfield* lays it down decidedly, in the case of *Miller vs. Race*, (1 *Burr.* 457, 459,) that bank notes are “not securities, nor documents for debts,” but “money” and “cash.”

Money does not fall within the reason of the rule, why choses in action are not considered goods and chattels, so as to be the subject of larceny. The reason of that rule is said to be, because choses in action have no intrinsic value, and so far has this notion been carried, that the intrinsic value of the parchments on which they have been written, and even of the box containing them, has been disregarded. 2 *Str.* 1188 ; 3 *Inst.* 109 ; 2 *Russell*, 1112 ; 2 *East P. C.* 591 ; *Hawkins*, B. 1, ch. 25, § 33. But there is an intrinsic value in the metal, of which the money is made, without reference to the “form and pressure,” which makes it coin. Ancient medals are not now money, yet they were once so ; (*Priestley's Lectures on History*, -Lect. 6 ;) and in an indictment, would now be described as goods and chattels. Another reason is assigned in *Hawkins*, in the passage already cited for the rule, that choses in action are not, at common law, the subject of larceny, as goods and chattels, because, being of no intrinsic value, and “of no manner of use to any but the owner, they are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner.” Surely, gold and silver coin, and current bank notes, are not within the reason of this rule, and *cessante ratione cessat ipsa lex*.

Upon a close examination of the cases in which such a strict interpretation has been given to the word *goods*, *in favorem vitæ*, by the *English* Courts in construing penal statutes, it will be found, that it has been on account of the accompanying words, "wares and merchandise," which are not in the act of congress; hence it has been ruled, according to the maxim *noscitur ex sociis*, that "goods" were to be understood as "*ejusdem generis*" with "wares and merchandise." *Foster*, 79. But there has been a later case than any of those cited which make in favour of the defendant, and in effect overruling them, *Dean's* case, decided in 1795, and reported in 2 *Leach*, 693, where it was ruled, that a bank note was within the words "goods, wares, and merchandise," in the statute of 12 *Ann*, *ch.* 7. In this Court also, specie has been held to be "goods, wares, and merchandise," under the penal provisions of the revenue law of March 2, 1799, and liable to forfeiture when unladen without a regular entry, and a custom-house permit. 2 *Mason*, 47. In *Holbrook's* case, 13 *Johns. R.* 90, and *Richards's* case, 1 *Mass. R.* 337, it was held, that bank notes, in an indictment for larceny, might be described as goods and chattels.

In the Chancery Court in *England*, at first view, apparently different opinions have been entertained upon the question, whether money or bonds ought to be considered as goods. In 1 *P. Williams*, 267, it was decided, that a devise of all one's goods passes a bond; and in 3 *P. Williams*, 112, it was decided, that under a devise to one of "household goods and other goods, plate, and stock, within doors and without," with the residue of the personal estate to another, the ready money and bonds did not pass. But the latter case does not contradict the former, for the decision was upon the ground of the intention of the testator, indicated by the residuary bequest, which would have been inoperative and ineffectual if the bonds and cash had passed by the general words of the first bequest.

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In relation to the strict construction of penal statutes, often defeating the intention of the legislature, the favouring of astute quibbling exceptions has been lamented by the greatest judges as a blemish to the administration of justice, and less strict notions on this subject now prevail than anciently. Formerly, it was held under the statute of *Edw. 6, ch. 2*, against stealing *horses*, that he, who stole but *one horse*, could not be convicted on that statute, 1 *Bl. Comm.* 89. But in *Hassel's* case, 1 *Leach*, 1, it was held, that a person who stole but *one bank note*, was within the statutes 2 *Geo. 2, ch. 25, § 3*, and 13 *Ann, ch. 7*, against stealing "*bank notes*." In the *United States*, where the laws are not written in blood, and where the people are governed by a mild and merciful system established by themselves, there has been less disposition in the Courts than in *England*, to favour fanciful constructions of penal statutes enabling offenders to elude justice. In *Fisher's* case, 17 *Mass. R.* 46, an unbroken series of adjudged cases giving a construction to the *British* statute of 7 *Geo. 2, ch. 22*, against the forgery of *orders for the delivery of goods*, of which the *Massachusetts* statute of 1804, *ch. 120, § 1*, upon which the defendant was indicted, is almost a transcript, was entirely disregarded, and the Court say, that the *English* cases cited for the defendant, though decidedly in point as to the construction of the *English* statute, admitted to be similar in its language to the *Massachusetts* statute, were "in favour of life," and sanctioned "as stricter construction" than they thought it necessary to give to the statute of *Massachusetts*, by which "the life of the offender is not put in jeopardy." To the same effect are the cases of *The People* against *Johnson*, (5 *Johns. R.* 226,) and *The State* against *Holly*, (2 *Bay.* 262.) In the celebrated work of that distinguished *American* jurist, *Edward Livingston*, the penal code prepared for the state of *Louisiana*, the rule of the *English* Courts of favourable and unfavourable construction of statutes according to the civil or criminal character of the cause, is abolished, and "all penal laws are to be construed ac-

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according to the plain import of the words taken in their usual sense." *Penal Code of Louisiana, B. 1, ch. 1.* In the Supreme Court of the *United States*, as well as in this Court, it has been declared, that though penal laws are to be construed strictly, they are not to be construed so as to defeat the obvious intention of the legislature. 5 *Wheat.* 76-94; 1 *Gallis.* 114.

It is therefore contended, that the defendant's case is within the statute upon which he is indicted, and that the money, as money, and bank bills, are "personal goods," and that at all events, the defendant may be indicted and convicted for stealing the gold and silver money, described in the second count not as coin, but simply as pieces of gold and silver metal, on account of the intrinsic value, for in this count the property is described with all the accuracy the law requires, by *number, species, and value.* 3 *Maule & Schw.*, 539, 547, 548.

In conclusion, it may be remarked, that in the latter part of the section, upon which the defendant is indicted, the word "*property*," which is broad enough to include money and bank notes, is used as of the same force and meaning, as the expression, "*personal goods*," in the first part of that section.

STORY J. The 16th section of the crimes act of 1790, *ch. 36*, provides, "that if any person &c., upon the high seas, shall take and carry away, with an intent to steal or purloin, the *personal goods of another*, the person &c. shall, on conviction, be fined not exceeding the fourfold value of the property so stolen," &c. The question is, whether foreign coin, and domestic coin, and bank bills, or any of them, are "*personal goods*" within the intent of the statute. In the strictest sense of the common law, "*personal goods*" are moveables belonging to, and the property of, some person, which have an intrinsic value. And even in this, the strictest sense, there cannot be any legal doubt, that the foreign and domestic coins, enumerated in the indictment, are "*personal goods*," for they have an intrinsic value. In a more large and

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liberal sense, the term "goods" may embrace moveables not having any intrinsic value, such as choses in action and monied securities, notes, bonds, and other debts, and evidencies of debts. Thus, a bequest by a party of all his goods and chattels, without any other restrictive or explanatory words, would carry choses in action, bonds, &c., as well as money and other valuable moveables. And this upon the plain import of the words, as expressive of the intention of the testator.¹ But in construing penal statutes, Courts of law have often, in favour of the citizen, interpreted the word "goods" in its strictest sense; and, indeed, in capital felonies, have sometimes, in favour of life, adopted a far more limited meaning, savouring too often of unseemly nicety, if not of extravagant refinement.

The words of the present enactment approach very near to the definition of larceny at the common law. The usual definition of that offence is, the felonious and fraudulent taking and carrying away by any person of the mere *personal goods* of another;² and according to *Bracton*, (*Lib. 3, ch. 32*), "*furtum est secundum leges contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit*," answering very nearly to the description given by a late learned judge, that it is the felonious taking of the property of another, without his consent and against his will, with intent to convert it to the use of the taker.³

In the above definition, "personal goods" has always been construed to mean such moveables only, as have an intrinsic value; and therefore as not comprehending mere choses in action. The common law did not deem the latter the subject of larceny, because they were not of any intrinsic value, and did not import any

¹ *Anon. 1 P. Will. 267.*

² *4 Black. Comm. 229.—3 Inst. 107.—2 East, C. L. 553.—2 Russell, Crimes, 1032.*

³ *Hammond's case, 2 Leach, C. C. 1089.—2 Russell, Crimes, 1032, 1033.—2 East, Cr. Law, 553.—Curwood's Hawk. B. 1, ch. 19, and note, ibid.*

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property *in possession* of the person, from whom they are taken.⁴ It was upon this ground that this Court thought itself constrained to hold, in the case of the *United States vs. Davis*, (*ante*, 356,) that mere choses in action (such as a private promissory note for money,) were not personal goods within the purview of the act of 1790. It was presumed, that as the legislature made use of language importing, almost in the very words of the common law, a definition of larceny, such "personal goods" only, as might be deemed property in possession at the common law, were within the contemplation of the act. But to carry the exception farther, and exclude money and coin of foreign or domestic coinage, which are in the strictest sense "personal goods," having an intrinsic value, would, in our judgment, be to indulge a latitude of construction not properly belonging to judicial tribunals. The natural sense of the terms of the act ought to be adopted, unless the context affords clear proof of some more restrictive application of them. Very little light can be gathered from the decisions of the *English* Courts, upon the construction of their own statutes, to assist us in this part of the inquiry. In the first place, as has been already intimated, Courts of law, in cases of capital felonies, have been very astute, perhaps unjustifiably so, to escape from the literal meaning of the words, and to create conjectural exceptions. Such a proceeding, if it may be properly allowed in cases affecting life, is wholly inapplicable to cases of mere misdemeanors, and to other cases not capital. There is much masculine sense in the distinction taken on this subject by the Court, in the case of the *Commonwealth vs. Fisher*, (17 *Mass. R.* 46.) In the next place, there is not a single decision in the *English* books to our knowledge, which, in point of authority, ought to govern in the construction of the present act; for, in no *English* statute are the objects or the language substantially the

⁴ 4 *Black. Comm.* 234.—2 *Russell, Crimes*, 1112.—2 *East, P. C.* 597.—*Anon. Dyer R.* 5.—*Rex vs. Morris*, 2 *Leach, C. C.* 525.—3 *Inst.* 107, 109.—*Co. Litt.* 118 b.—*Calve's case*, 8 *Co. R.* 33 a.

same with ours. There are other accompanying words, or other clauses in the context, explanatory of the legislative intent, which might well authorize, if they did not absolutely require, the Court to adopt the narrower construction, *in favorem vitæ*. It will be sufficient to cite a few of the more prominent cases in order to establish this position. In *Rex vs. Leigh*, (1 *Leach*, C. C. 52,) it was held by the Court, that stealing money was not a capital larceny within the statute of 24 *Geo. 2*, *ch.* 45. The words of that statute are, "all and every person &c., who shall feloniously steal any *goods, wares, or merchandises*, of the value of 40 shillings, in *any ship, barge, &c.* upon any navigable river, or in any port, &c. or upon any *wharf or quay, adjacent to such river or port.*" The Court thought, that the construction ought to be confined to such goods and merchandises as are usually lodged in ships, or on wharfs and quays. Reliance was also placed upon the accompanying words, "*wares and merchandises*," (*noscitur a sociis*,) and upon the clause as to *wharfs and quays*; and very properly, for it was difficult to presume, that the legislature had a different intent, as to goods in ships, and on wharfs; and money is not usually lodged on wharfs.⁵

In the act of 1790, there are no such accompanying words; "personal goods" stand alone in the text, without any qualifying clause. In *Rex vs. Guy*, (1 *Leach*, C. C. 241,) which was an indictment for receiving two guineas, which were stolen, it was held, that under the statutes of 3 *W. & M.*, *ch.* 9, § 4, and 5 *Ann*, *ch.* 31, § 5, there cannot be an accessory after the fact for receiving *money*. The statute of *W. & M.*, *ch.* 9, provides, that "if any person &c. shall buy or receive any *goods or chattels*, that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he &c. shall be taken and deemed an accessory &c. to such felony, after the fact." The statute of 5 *Ann*, *ch.* 31, provides, that "if any person &c. shall

⁵ *Foster*, C. L. 79.—2 *East*, C. L. 647.

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receive or buy *any goods or chattels*, that shall be feloniously taken or stolen &c.," in the same general terms, as that of *W. & M.*⁶ The judges, in the construction of these statutes, seem uniformly to have held, that the words "goods and chattels" mean such goods and chattels, whereof larceny could be committed at the common law, upon the plain ground, that the legislature did not intend to create any accessorial offence, except in cases where there was a principal offence already committed. It is certain, that guineas are "*goods and chattels*," in the common law sense of the terms, and as such, subjects of larceny ; and it is somewhat difficult, therefore, to account for the decision in *Rex vs. Guy*, upon the principle above stated. Mr. *East* supposes the decision to have proceeded upon the ground, that the statutes extended only to the receipt of such kind of goods and chattels, the property in which, being generally, and in its own nature, capable of being ascertained by outward marks and circumstances, made it more difficult for the thief to dispose of them without the aid of a receiver, by whom he was encouraged and protected, whereas money has no such distinguishing marks.⁷ This ground seems wholly unsatisfactory ; for if larceny might be of money at the common law, (which cannot be doubted,⁸) there seems no just reason, why the accessorial offence should not, if the words of the acts did not convey any restriction, be held co-extensive with the principal offence. The ground, however, such as it is, is inapplicable to the principal offence, and is limited to receivers. In *Rex vs. Morris*, (2 *Leach*, 525,) it was decided, that the receiver of bank notes, knowing them to be stolen, was not punishable as an accessory under the statute of 3 *W. & M.*, ch. 9, and 5 *Ann*, ch. 31, notwithstanding the express declaration in the statute of 2 *Geo. 2*, ch. 25, (2 *East*, P. C. 598,) that if any person

⁶ 2 *East*, P. C. 743, 744.

⁷ 2 *East*, P. C. 748.—2 *Russell*, Crimes, 1307, 1308.

⁸ *Hawk. B. 1*, ch. 32, § 35.—2 *Bl. Comm.* 387.

shall steal any *bank notes*, &c. "he shall be deemed guilty of felony, of the same nature and in the same degree, &c. as if the offender had stolen or taken any other goods of like value, with the money due, &c." upon the ground, that the latter statute did not reach receivers of bank notes as accessories under the former statutes, but applied only to the principal offender in the larceny. But this case has been since shaken by the decision in *Rex vs. Dean*, (2 *Leach*, C. C. 798.⁹)

These are the most material cases, and they fall far short of establishing the proposition, that "personal goods" in the act of 1790, do not include coin, or money. In our judgment, it would be an unjustifiable departure from the language of the legislature to hold, that coin and money are not included within the prohibition. They are equally within the terms and the reason of the enactment.

In respect to the *bank bills* included in the indictment, there is much more difficulty. I agree to the doctrine of Lord *Mansfield*, in *Miller vs. Race*, (1 *Burr. R.* 457,) that bank notes are usually treated in the common business of life as money and cash, and not as goods and chattels, or securities for money. But that case turned upon very different considerations from those, which govern in the construction of penal statutes. There the only point was, whether bank notes, being used as currency, the owner could, in case they were stolen, recover them against a subsequent *bonâ fide* holder. The Court adjudged, that he could not, upon sound principles of public policy. Now, there is strong reason to believe, that bank notes were not, before the statute of 2 *Geo. ch.* 25, held to be "goods or chattels," within the meaning of the statutes of *W. & M.*, and *Ann*, above referred to. This is not decisive; but it affords a presumption, that in the opinion of Parliament, it was necessary to punish the larceny of bank

⁹ See 2 *East*, P. C. 646, 749.—2 *Russell*, Crimes, 883, and note.—*Id.* 1307, 1308.

notes by a specific description, *eo nomine*. Technically speaking, bank bills are merely promissory notes for the payment of money ; and they may be declared on as such.¹⁰ They are not in all cases treated as *money*, though in most instances, for the purposes of civil justice, they are so. In *The Commonwealth vs. Carey*, (2 Pick. R. 47,) the Court declared, that a bank note might, in an indictment for theft, be described as a promissory note of the bank; and in this respect it was not distinguished from other private choses in action. In *Spangler vs. The Commonwealth*, (3 Binn. 533,) the Court seem to have treated bank notes as no otherwise the subjects of larceny than as statutable enactments had made them so. And Yeates J. on that occasion said, that bank and promissory notes are mere choses in action. But in *Commonwealth vs. Bower*, (1 Binn. 201,) upon an indictment for larceny of bank notes, the Court thought, that a description of them as the “goods and chattels” of the true owner was sufficient. The same doctrine is implied in *Commonwealth vs. Richards*, (1 Mass. R. 337.) In *The People vs. Holbrook*, (13 Johns. R. 90,) the point was directly decided ; and it was held, that in such a case, “goods and chattels” implied property or ownership. But in each of these cases there was a state statute, which made the larceny of bank notes a substantive offence ; and in two of them, the state statute was to the same effect as that of 2 Geo. 2, ch. 25 ; and it is not impossible, that these considerations had an influence upon the decision.

The doctrine in *New York* has gone farther ; and bank notes have been held liable to be taken in execution upon a *fiери facias*, as money. *Handy vs. Dobbin*, (12 Johns. R. 220.) This decision would be entitled to very great weight, if it stood wholly uncontradicted. But in *Massachusetts*, an opposite doctrine has been maintained. *Perry vs. Coates*, (9 Mass. R. 537.) Still,

¹⁰ *Young vs. Adams*, 6 Mass. R. 182.—*Perry vs. Coates*, 9 Mass. R. 537.

there is this material difference between bank notes and other promissory notes, that the former in the common transactions of life are treated as money, and circulate as currency, and therefore have, in themselves, an intrinsic value in the common estimation of mankind. They are at least as much within the policy of the act of 1790, *ch.* 30, and as important to be guarded against larceny as any personal property whatsoever. Under such circumstances, the Court has been anxious to ascertain, whether bank bills have been in any cases of a penal nature treated differently from any other choses in action; and especially, whether in cases of statutable larcenies, they have been distinguished from other negotiable notes. In *Rex vs. Dean*, (2 *Leach*, *C. C.* 798,) the indictment was for stealing a *bank note* of the value of \$20, the property of *J. M.*, in his dwelling house. The statute of 12 *Ann*, *ch.* 7, § 1, makes stealing “any money, goods, chattels, wares or merchandises, of the value of 40 shillings,” a capital offence. It was objected, that bank notes were not “money, goods, chattels, wares or merchandises,” within the purview of the statute. But the judges were unanimously of opinion, that they were; for that the statute was intended to protect every species of property. But the statute of 2 *Geo.* 2, *ch.* 25, (2 *East*, *P. C.* 597, 598,) already referred to, doubtless had great influence in the decision, since it put the stealing of bank notes upon the same footing as to nature, degree, and punishment, as the stealing of any other goods; though this ground does not expressly appear in the opinion of the judges. In *Rex vs. Clarke*, (2 *Leach*, *C. C.* 1036, 4th edit.) the indictment was for larceny of certain *bankers’ notes*, and for certain pieces of paper, of the value, &c. each stamped, and re-issuable, as bankers’ notes, payable to the bearer. It appeared in evidence, that the notes had been taken up by the bankers’ agents, and were stolen from a parcel in their transit to the bankers for the purpose of being re-issued. The objection was, that the notes, having been paid, were of no value, and consequently, not the subject of larceny. The prisoner was

convicted; and the judges held, that he was rightly convicted. Mr. Justice Grose, in delivering their opinion, said, "The question submitted in this case to the consideration of the judges was, whether the paper and stamps are, under the circumstances of the case, *the subjects of larceny at the common law*; or in other terms, whether they are *the property of, and of any value to, J. J. and A. L.*, (the bankers,) who were unquestionably the owners. These gentlemen have paid for the paper, the printing, and the stamps of these papers, which once existed both in character and value as promissory notes. Their character and value as promissory notes were certainly extinct at the time they were stolen. But even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability, in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value, as papers, &c. In what sense or meaning, therefore, can it be said, that these stamped papers were not the valuable property of their owners? They were indeed only of value to those owners; but it is enough, that they were of value to them. Their value to the rest of the world is immaterial. The judges are, therefore, of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors."¹¹ It cannot escape observation, how strongly every word of this opinion applies to the case of bank notes, which are outstanding; and it is to be considered, that the question on the counts, to which alone the opinion applies, was, as to the larceny at the common law. If bankers' notes payable to bearer were of the value of the stamps, and paper, and printing, because re-issuable, and therefore to be deemed valuable property, the subject of larceny, *a fortiori*, bank

¹¹ 2 East, P. C. 646, 749.—2 Russell, Crimes, 984, 1307, 1308.—*Rex vs. Hammon*, 2 Leach, C. C. 1083, (4th edition.)

¹² See also S. C. 2 Russell, Cr. L. 147, and note, (2d English edition. 1828.)

notes, for which the holder must be presumed to have given value, and which have in his hands a present value as currency, must be deemed such. There is, indeed, such a persuasive good sense in the opinion, that one feels very great difficulty in escaping from its conclusive effect in cases of the larceny of other mere choses in action. *Rex vs. Ransom*, (2 Leach, C. C. 1090,) is not so strong in its application. But *Rex vs. Vyse*, (1 Ryan & Moody, C. C. 218,) not only affirmed the doctrine in *Rex vs. Clarke*, but proceeded a step farther. It was there held, that bankers' notes, so paid and reissuable, were not only subjects of larceny at common law, but might be described in the indictment, (as in that case they in fact were described,) as "goods and chattels" of the owners.

These cases distinctly show, that in modern times, Courts of justice in penal, and even in capital cases, are disposed to look at the real nature of the things stolen, and though they are in form choses in action, yet, if possessing a real value in possession, to hold them subjects of larceny. The choses in action, which were held originally not to be the subjects of larceny at the common law, were those, which had no intrinsic value, (bank notes were not then in existence,) and did not import any property in possession of the person. Can it be truly said, that bank notes, payable to bearer, and passing as currency, have no present value in possession? The present indictment has described them as of the value, which they purport on their face to promise to pay. They pass as money; they are received as money. In counts of justice, they are treated as money. On a declaration for money had and received, proof, that the defendant received bank notes for the use of the plaintiff, would be sufficient to maintain the action. They have a present value in possession, not as a mere promise to pay money, but as money of an immediate, positive, exchangeable value. It seems to us, therefore, that it would be an over refinement to hold, that they are not "personal goods" within the sense of the act of 1790. They are far better entitled to the appella-

tion of "goods and chattels," than the paid bankers' notes in *Clarke & Vyse's* cases abovementioned.

Besides, the bank notes of the bank of the *United States*, by the express provisions of the charter, (of which, as a public act, we are bound judicially to take notice,) are receivable in payments to the *United States*; and they have, therefore, a present value, for such purposes, as cash. The same cannot be said of the other bank notes, stated in the indictment. But we are still entitled to consider them as of the present value of their respective denominations, as they are so alleged in the indictment.

If this were an indictment at common law, we might, as to the latter bank notes, have some hesitation, though the cases of *Clarke & Vyse* would certainly go far to remove any technical scruples. One reason, why, at the common law, bonds and other choses in action were not deemed subjects of larceny, was, that they could not be used as property in possession by the thief, but were suable only by the owner. But bank notes, payable to bearer, are not now liable to such a consideration; for they are of present worth and value to the holder, and pass by delivery. We are now construing a public statute; and if we can perceive, that the words of the statute, in common and legal understanding, are large enough to comprehend bank notes, and that the policy of the statute applies to them with at least the same force, that it does to "personal goods" in the most restrictive sense of the terms, we are bound to give that interpretation, which carries the words to the extent of the mischief. We may say, as the judges did in *Dean's* case, (2 *Leach*, C. C. 798,) "that the statute was intended to protect every species of property," which may be deemed valuable property in possession. In the case of *Rex vs. Robinson*, (2 *Leach*, C. C. 869,) the judges held, that bank notes were a *valuable thing* under the statute of 9 *Geo. 1*, ch. 22, respecting threatening letters, which uses the words "money, venison, or other valuable thing."¹³ But a private promissory

¹³ See also *Rex vs. Aslet*, 2 *Leach*, C. C. 958, (4th edition.)—2 *East*, P. C. 1110.—2 *Russell*, Crimes, 1830, &c.

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note has been held not to be so. *Rex vs. Major*, (2 Leach, C. C. 894; 2 East, P. C. 118.) A distinction is here manifestly taken between choses in action, which are mere evidences of a debt, and those, which have a present value as currency. It can scarcely be doubted, that under the statute of 30 Geo. 2, ch. 24, respecting false pretences, *bank notes* must have been deemed "money, goods, wares, or merchandises," although there is no case, now recollected, which turned on that point.¹⁴

Upon the whole, the Court are of opinion, that the bank notes stated in the indictment, equally with the coin, are personal goods within the act of 1790, and therefore sentence must be passed upon the prisoner accordingly.

 JOHN PETERS *et als.* vs. ZEBEDIAH ROGERS AND TRUSTEE.

A person, who is a citizen of *Maine*, having his home and inhabitancy there, is not liable to be sued as trustee of a citizen of *Maine*, in the Courts of *Massachusetts*, under the trustee attachment process, (act of 1794, ch. 65,) notwithstanding his business in the coasting trade compels him to pass about half his time in *Massachusetts*.

INDEBITATUS assumpsit. The only question was, whether the trustee was, upon his disclosure, answerable.

Bartlett and *Peabody*, for the trustee. The marginal note in the case of *Ray vs. Underwood & Tr.* (3 Pick. 302,) is, "A person who has never been an inhabitant or resident within this commonwealth, but who only comes here occasionally in the day time, is not liable to the trustee process." And such is understood to have been the construction uniformly held by the Supreme Judicial Court; that it is a local statute, and not applicable to foreigners, or citizens of other states. The case of *Tingley vs. Bateman & Tr.*, (10 Mass. R. 343,) holds the same doctrine.

¹⁴ See 2 East, P. C. 832.

There can be in the *United States* Court no such difficulty as sometimes occurs in the state Court, respecting the suit being brought in the wrong county ; for the Circuit Court in *Suffolk* is the Court for every county in the state.

The objection to charging the trustee is, that the statute is local ; and, by a just construction equally binding on all Courts, it cannot apply to transactions and trusts originating out of the state, or to persons domiciled in another state and casually here. It is like the garnishee process in *London*, where a debt arising out of the jurisdiction, is not attachable within the city. 1 *Roll. Abr.* 551 ; 3 *Lev.* 23 ; *Show.* 10.

The same doctrine is held in *Kidder et al. vs. Packard et al.*, (13 *Mass. R.* 80 ;) and in *Picquet vs. Swan & Tr.*, (4 *Mason*, 443,) the Circuit Court held, that they were not inclined to give a larger operation to the statute than its words clearly import.

Kinsman, for the plaintiff, argued as follows :

It will be perceived by the answer of the trustee, that the contract, by virtue of which he had possession of the vessel, was made in *Boston*, that the vessel was in *Boston* at the time the trustee was summoned, and that *Pierce* himself, although his family resided in *Maine*, transacted his most important business in *Boston*, and that "the course of that business led him to spend about the same period of time in both places."

We think the above mentioned facts are sufficient to give the Court jurisdiction, and to render the trustee chargeable. The statute providing the trustee process, was intended to remedy the inconvenience precisely, which existed in this case. It provides, "that the creditor may cause the goods &c. of his debtor to be attached, in whose hands or possession soever they may be found," where such goods &c. "cannot be attached by the ordinary process of law ;" if the property in this case had not been pledged to *Pierce*, being within the jurisdiction of the Court, it might certainly have been attached in the ordinary way ; but being in *Pierce's* possession, and not liable to attachment by the ordina-

ry process, the plaintiff ought to have his remedy by the statute providing for foreign attachment.

As to the cases cited by the other side, the opinion of the Court in *Ray et al. vs. Underwood*, (3 Pick. 302,) is given with great caution, the circumstances being all stated, as, "that the person summoned was not an *inhabitant* of, or *resident* within, any town in this commonwealth, but that he only came within it occasionally in the day time," making clearly a distinction between an inhabitant and a resident, and leaving us to infer, that a slight variation in the circumstances might have made a material difference in the result of the case. The present case is different from that, inasmuch, as, in the first place, *Pierce*, the trustee, was a *resident* in *Boston* for purposes of business, and it so appears by his answer. Again, it differs from the case in *Pickering*; in this, that the property itself, as to which *Pierce* is supposed to be trustee, was also here, and, in this last respect, there is, too, a wide difference between the present case, and the case of *Kidder et al. vs. Packard et al.*, (13 Mass. R. 80,) as will appear by an examination of that case.

The cases cited from the *English* books seem to differ from the present, in the same particulars as the *American* cases, and the remark of the judge in the case in 4 *Mason*, 446, alluded to, that "he is not inclined to give a larger operation to the statute than its words clearly import," will not, we apprehend, prevent the Court from giving it its full operation, where the words and intention are both clear, as we think they are in the present instance.

It is further objected, that "the statute" [the statute regulating foreign attachment] "is local, and cannot apply to transactions and *trusts originating out of the state*, or to persons domiciled in another state and casually here." The ground stated in the first clause of the above named objection is entirely assumed, because the *transaction* in the case in question, did, in fact, originate in this state. According to our view of the operation of a local law,

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it is binding upon all persons and property within the limits and protection of the government where such law exists. The attachment law of *Massachusetts*, for instance, as respects other governments, is local, and yet property belonging to citizens of other states, and passing through *Massachusetts*, is liable, while within her limits, to be attached by her laws. What, then, should exempt this case from the ordinary operation of the law, where both the property and the holder of it are actually in the limits of the jurisdiction of the Court, and within the precinct of its officer?

But, however the law might have been before the passing of the late statute, (St. 1829, ch. 124, approved March 12, 1830,) respecting mortgages of personal property, to which the Court is respectfully referred, we think by that statute it is now settled. By section 2 of that act, it is clear, that the vessel in this case might have been specifically attached, the plaintiff complying with certain conditions therein mentioned; and surely, if the property were so much within the jurisdiction as to enable the creditor to attach it by the 2d section of that act, it must also be so far within the jurisdiction, as to enable the creditor to pursue the other mode pointed out in the 1st section, if more convenient or more agreeable. As it respects the jurisdiction of the *United States* Courts, it is believed to be every day's practise to sue defendants in states where they are only transient visitors, and not citizens or inhabitants; otherwise, from the very constitution of the Federal Courts, a plaintiff could never sue in the Circuit Court of his own state, unless in some cases specially provided for by law, such as those arising under patents.

STORY J. In the present case, the plaintiffs are described in the writ as of *Boston*, and citizens of *Massachusetts*, and the principal defendant as of *Bangor*, in *Maine*, and a citizen of *Maine*, and the trustee, as "of said *Boston*, mariner," without any description of citizenship whatsoever. The trustee in his disclosure avers, that at the time of the service of the plaintiff's

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writ upon him, his family resided at *Orrington*, in the state of *Maine*, and that said *Orrington* was the residence of this respondent when at home; that for many years before the service of said writ and since that period, this respondent has been engaged in the coasting trade between the state of *Maine* and *Boston*, purchasing, transporting, and selling cargoes, and that the course of business led him to spend about the same period of time in each place. The answer then proceeds farther to state, that the principal defendant, *Rogers*, had conveyed to him five eighths of a certain schooner, the *Chancellor*, as security to indemnify him against a promissory note, which he had signed as surety for *Rogers*; that he (the trustee) was part owner of the schooner, and had employed her in the business aforesaid ever since the transfer, and from *Rogers's* share of the profits had in part paid the note; and that the vessel is now in *Boston*, and the five eighths of *Rogers* are worth more than the debt due on the note &c. The service was made upon both principal and trustee in this district.

The question under these circumstances is, whether the party can be holden as trustee under the trustee attachment act of 1794, *ch.* 65. In the construction of local statutes the Courts of the *United States* have always been in the habit of respecting and following the decisions of the local Courts; and, it has been already intimated in this Court, that we are not disposed to enlarge by implication, in cases not controlled by authority, the influence of such a summary remedy. *Picquet vs. Swan*, (*ante*, 35.) It is well known, that by the provisions of this process no person can be summoned as trustee out of the county, in which he lives, if he be the sole trustee; and if he is so summoned, he is entitled to be discharged upon the matter appearing by plea, or otherwise, to the Court.¹ In *Tingley vs. Bateman*, (10 *Mass. R.* 343,) it

¹ See *Wilcox vs. Mills*, 4 *Mass. R.* 218.—*Davis vs. Marston*, 5 *Mass. R.* 199.—*Jacobs vs. Mellen*, 14 *Mass. R.* 132.

was held, that where the plaintiff and defendant and trustee all lived out of the state, the process was not maintainable, although service was made upon the trustee within the state. The Court on that occasion said, "there is a plain implication in another provision of the statute, that a person, liable as trustee, must be one, who at the time of the service of the writ, or within three years next preceding, has, or has had, his residence and home within the state;" and again, "a resident and inhabitant of another state is not in legal contemplation within the process of this Court, to be summoned as a trustee." In *Ray vs. Underwood*, (3 Pick. R. 302,) it was held, in conformity with a former decision, that a person, who has never been an inhabitant or resident within any town of the state, but only came within it occasionally in the day time to look after some of his property, he living in an adjoining town of a neighbouring state, was not liable to be summoned as a trustee. These authorities appear to me directly in point, and close the question now before this Court. They are founded in good sense and convenience. Upon any other construction, if an inhabitant of another state should be sued here as trustee for personal property locally situate in the state, to which he belonged, he could be obliged, in order to discharge himself, to bring the property at his own risk into the state, that it might be taken in execution, whatever might be its bulk or character, a ship or a cargo of lumber. This would be an intolerable grievance, and has never yet been claimed as a rightful exercise of jurisdiction on the part of this commonwealth. It is clear, upon the disclosure of the trustee, that he is a citizen of *Maine*, and has his family and home there; and he has, in a legal sense, no residence or inhabitancy in *Massachusetts*. Without stopping, therefore, to consider, whether, as a citizen of *Maine*, he is liable to be sued in this Court as trustee by the plaintiffs, who are citizens of the same state, it is the opinion of the Court, that by the local law he is entitled to be discharged, and he is accordingly discharged.

Picquet, Adm'r, *vs.* Swan *et al.*

PICQUET, ADMINISTRATOR OF PICQUET,

vs.

JAMES SWAN AND OTHERS.

If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants, who have appeared and answered the bill, may move for a dismissal of the suit for non-prosecution of the bill, against the non-appearing defendant; and the Court will grant a further time for the appearance of such defendant, if it seems reasonable, after which the bill is to be dismissed, unless such defendant appears and answers.

THIS was the case of a bill in equity, brought by the plaintiff, an alien, and a subject of the king of *France*, as administrator of *Jean Claude Picquet*, late of *Paris*, in the kingdom aforesaid, deceased, intestate, an alien, and also a subject of *France*, against *James Swan*, who was described in the bill as "a citizen of the *United States*, who now is, and for the last twenty years has been, an resident in *Paris* aforesaid, and not having an inhabitancy in any of the said *United States*," and against *William Sullivan* and others, also citizens of the commonwealth of *Massachusetts*. The bill sought payment of a large sum of money, asserted to be due from *Swan* to the intestate, and charged, that the defendants, *Sullivan* and others, were possessed of large funds of real and personal estate, belonging to *Swan*, which had been conveyed by *Swan* to them, (either directly or derivatively,) in the manner set forth in the bill, in fraud of his creditors. The bill, therefore, prayed process against *Swan*, and all the other defendants, and a discovery, and account and injunction, and satisfaction of the debt which was due to the intestate out of the funds of *Swan*, so conveyed to the other defendants, and for other relief, &c.

The bill was filed in November 1829, and process issued, returnable to the rule day in December following. The defendant *Swan*, never has appeared. All the other defendants except *Swan* have appeared and put in their answers, denying the equity of the plaintiff's bill. Exceptions were taken to

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these answers, which remain as yet undisposed of; and the plaintiff, upon leave granted, amended his bill, and to the amendments so made, no answers have been put in.

In January, 1830, the plaintiff obtained an order, appointing *Nathaniel Niles*, of *Paris*, a commissioner, to make service upon *Swan* in *Paris*, and to take his answer thereto. The commissioner, on the 7th of July, 1830, made return of the commission, that on the 7th of April, 1830, he had made service of the bill upon *Swan*, in *Paris*, by reading the same to him, and informing him that he would attend to the taking of his answer to the bill, if he chose, when he, the commissioner, should be requested. That for this purpose, he had kept the bill and commission three months, and that *Swan* had refused to make an answer thereto, within the said three months; and therefore, he returned the same. The commission was received by the clerk of the Court, and filed on the 6th of September following.

On the 18th day of the same month, *W. F. Otis* and *William Sullivan*, on behalf of all the defendants excepting *Swan*, moved, that the bill be dismissed, setting forth at length the grounds of their motion, the principal points of which were in substance as follows :

(1.) That it fully appeared from the plaintiff's own showing, that the real parties to the suit were the complainant and said *Swan*, and that the other persons named as defendants in the bill, could not, in any event, be made accountable, until the plaintiff had first established a right against said *Swan*.

That from the grounds of the suit as set forth in the plaintiff's bill, it was apparent that the matters of defence could not be set forth and availed of by any other party than said *Swan*, that he was, therefore, a *material* and *necessary* party, and the cause could not be had and determined, without his presence.

(2.) That it appeared from the return of the commission, issued by the Court for the purpose of taking the answers of said *Swan* at *Paris* under oath, that he declined answering or sub-

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mitting himself to the jurisdiction of the Court, and that the plaintiff therefore could not further proceed against said *Swan* in this Court, nor, consequently, against the other persons made defendants in the suit.

(3.) That even if said *Swan* was within the jurisdiction of the Court, and had appeared and answered in this suit, the bill of complaint charged no such sufficient matter of equitable jurisdiction, as would support the case, and the plaintiff had, by his own showing, a plain, complete, and adequate remedy at law.

(4.) That it was repugnant to the fundamental principles on which Courts of chancery proceed, to entertain litigations, which are founded on mere breaches of promise, and on choses in action for the recovery of damages; that a party having such a claim, must show that he has resorted to all the remedies, which are afforded in the Courts of common law, without success, before he can apply for aid to a Court of equity; and that it did not appear from the complainant's bill, that there was not a competent tribunal before which he might obtain a legal remedy for his alleged wrongs.

On the 27th of October following, *Hubbard* and *Blair*, for the plaintiff, moved, that further time be allowed to the defendant *Swan*, to appear and answer, and supported their motion by the affidavit of the plaintiff, which stated that he had good reason to believe, that *Swan* admitted the justice of the claim, and was willing and anxious to appear in the cause and make answer thereto; but that he could not put in a sufficient answer without reference to documents and information, accessible in the *United States* only. That during the time given him to answer under the commission, he was confined in *Paris*, but expected in a short time to be released, and to arrive in the *United States* within a short period; and for the grounds of his belief in these statements, the plaintiff referred to certain letters from said *Swan*, and the commissioner, addressed to himself, his counsel, and the Court, which were attached to his affidavit. Both motions were heard together by the Court, upon the request of counsel.

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Sullivan and Otis for the defendants, excepting *Swan*.

When many parties are named in a bill as defendants, and process is prayed against all of them, and some are within the jurisdiction and appear and answer, and others are not within the jurisdiction and do not appear, what is the chancery practice in *England*, in such case?

It is believed, that the *English* practice is to see, whether the bill is so framed, that the Court can proceed against the parties who are before the Court; and if it can decree without the absent parties, or can so decree as not to affect their rights, it will proceed. The *English* Courts notice the distinction between "active" and "passive" parties; and when the former are absent, it cannot decree. In 1 *Madd. C. P.* 178, it is said, "there sometimes arises an absolute defect of justice," (from the absence of parties,) "which seems to require the interposition of the legislature."

"Active" parties, are those, who are legally or beneficially interested in the subject matter, or result of the suit. When such parties are not before the Court, it may refuse to decree, or if a decree be made, it may be reversed. Whether the absent party be legally or beneficially interested, must depend on the charges in the bill. *Cooper's Treatise on Pl.* 33 et seq.; *Palk vs. Clinton*, (12 *Ves.* 58;) *Fell vs. Brown*, (2 *B. C. C.* 276.)

If the Court in this case can only examine the bill, and not the answers, it appears that *Swan* is the principal party, as supposed debtor, and as *cestui que trust*. *Adams vs. St. Leger*, (1 *Ball. & B.* 181.)

If the answers of the defendants, who have appeared, are examinable, then it clearly appears, that *prima facie* the absent party is the only party; as those defendants, who have appeared, are not even necessarily put upon their defence, until a right is established between the plaintiff and the absent party.

In such a case, *English* Courts of chancery are limited by rules common to all Courts, viz. that they must have parties before them, before justice can be administered between parties.

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It would be as new in *England*, as it would be here, to insist, that the Court ought to proceed to decree between parties, who are before it, because other necessary, or active parties, cannot be compelled to appear.

To prevent a demurrer for want of parties, a bill sometimes charges, that a party is beyond the jurisdiction.

In such case it would depend on the frame of the bill, whether the absent party was a necessary one, or not; and in such case, the question would arise on the hearing.

The case now before the Court arises on a preliminary motion to dismiss, because a necessary party is not before the Court.

The plaintiff has charged, that this party is out of the jurisdiction, but has prayed process against him. The plaintiff has done what he could to bring him in, and has failed to do so. The plaintiff admits the necessity of that party's presence.

It is not doubted, that in such case the *English* practice would require, that the bill should be dismissed. The plaintiff has shown to the Court, that it cannot proceed :

First, by charging, that the absent person is an indispensable party.

Secondly, by charging that he is beyond the jurisdiction.

Thirdly, by showing, (from the commission sent forth and returned,) that he will not appear.

No case has been found, in which an *English* Court has retained a bill under such circumstances.

As to the practice in the *United States*. The chancery Courts of the *United States* are governed, (1.) by the constitution and laws of congress; (2.) by their own rules of practice; (3.) by *English* rules, when neither of the former apply.

These Courts are of limited jurisdiction; and it is too well settled to need authorities, that the jurisdiction must appear on the record.

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(1.) Has this Court jurisdiction between the parties on the record? *Ex parte Graham*, (3 Wash. C. C. R. 456 ;) *Picquet Swan*, (*ante*, 54.)

(2.) Must not the record show, that the Court has jurisdiction over all the parties in the suit? *Strawbridge vs. Curtis*, (3 Cr. 267 ;) *Corpo. of New Orleans vs. Winter*, (1 Wheat. 92.)

When it appears on the record that the Court has proper parties before it, then the question may arise, whether it has ALL the proper parties before it. On this question several adjudications appear. *Ex parte Graham*, (3 Wash. C. C. R. 456 ;) *Harrison vs. Cowen*, (*Peters's C. C. R.* 490 ;) *Joy et al. vs. Wirtz*, (1 W. C. C. 517 ;) *Russell vs. Clark*, (7 Cranch, 88 ;) *Wormley vs. Wormley*, (8 Wheat. 451 ;) in which case in a note, *West vs. Randall* is quoted from 2 *Mason*, 181-190, in which the learning on parties is exhausted. *Elmendorf vs. Taylor*, (10 Wheat. 166 ;) *Mallow vs. Hinde*, (12 Wheat. 196.)

On the question of delay, to decide whether the Court will retain a bill for an absent party to come in, no case has been found in the *English* books, but *Fell vs. Brown*, (2 *Brown's C. C.* 276.)

It does not appear that the defendant in that case was injuriously affected by delay, or that he objected to it; nor even that the suggestion did not come from him. He was ready to account.

The motion for further delay is addressed to the discretion of the Court. It is believed, that the exercise of this discretion requires, that all the circumstances attending these long continued litigations should be adverted to; and that the Court should look into the answers to decide, whether delay will help the plaintiff.

As the defendants set up an adverse and distinct interest, it is suggested, that the plaintiff is held to show, that *there will be a time* when he can proceed with the presence of the now absent party; because, if that party should ever return, he may proceed anew.

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The difference to him, between retaining this bill and beginning again, is trifling. To the defendants it is a most serious evil, and a damage for which they know not of any remedy against this party. A judgment against him for the wrong done, if it should be found to be a wrong, may be fruitless as to compensation.

In *Livingston vs. Gibbons*, (4 J. C. R. [N. Y.] 99,) the doctrine of appearance is recognised and stated.

Hubbard and Blair, for the plaintiff.

(1.) As to dismissing the bill.

When one party is out of the jurisdiction, and the other parties within it, the practice is, to charge that fact in the bill; and if admitted in the answer, or proved in the cause, the Court, if the property in dispute is in the power of the other parties, may act upon the property, notwithstanding the absent party is not before the Court. 1 Bro. Ch. 250; 1 Sch. & Lef. 240; 2 Bro. Ch. 277; 1 Vern. 487; 2 Bro. Ch. 395; 4 Ed. Mitf. 164; 1 Ves. 385; Pr. Ch. 83; 2 Atk. 510; 2 Bro. Ch. 399; Mitf. Pl. 164; 2 Sim. & Stw. 219; 11 Wheat. 132; 4 Ed. Mitf.; Bunbury, 200; 16 Ves. jr. 326; Blak. Ch. Pr. 20; Eq. Cas. Abr. 74; 4 Eq. Rep. S. Carolina, 343; 1 Montague Dig. 66; 3 Cranch R. 220; 10 Wheat. 166; Mitf. 134; 2 Mason R. 181; 1 Ves. 385.

If the absent party is required to be active in the performance of the decree, as if a conveyance by him be necessary, or the foreclosure of a mortgage against the original mortgagor, the Court cannot proceed to a determination against the absent party. 1 Turner & Veneble, 93, (6th ed.)

If absent parties are merely passive objects of the judgment of the Court, they will proceed against the defendants, who are before the Court. 1 Grant Ch. Pr. 25, (2d ed.); 2 Mod. Ch. Pr. 177.

As to service on *Swan*. Service of a subpoena upon a defendant while abroad, as in *Scotland*, seems to be good. But not

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upon a foreigner, residing in a foreign country. 1 *Newland Ch. Pr.* 78, (3d ed. ;) 1 *Grant Ch. Pr.* 78, (2d ed.)

(2.) Plaintiff's motion for time to enable Swan to appear and answer.

If plaintiff suffer three terms after answer filed, without taking any steps in the cause, the defendant may move to have the bill dismissed for want of prosecution. 1 *Newland Ch. Pr.* 240, (*English ed.* 1819 ;) 15 *Vez. jr.* 291 ; 16 *Vez. jr.* 127-204 ; 3 *Vez. & Beames*, 1 ; 1 *Harrison, Ch.* 401, (*Farrand's ed.*)

Where there are a number of defendants, and some abroad, and the plaintiff is in prosecution for an answer, the Court will not dismiss. 2 *Atk.* 604 ; *Hard's Solicitor*, 23 to 30, as to time given.

Where there is a plea and answer, the bill will not be dismissed till the plea is argued. *Barnardiston R.* 280 ; 2 *Vez. jr.* 287.

After an order to amend, the defendant cannot dismiss the bill for want of prosecution, until three terms after his answer to the amendments. 14 *Vez. jr.* 208 ; 1 *Newland Ch. Pr.* 243, 244 ; 1 *Turner Ch. Pr.* 345, (*English ed.* 1817 ; *Harr. Ch. Pr.* 31, (*ed. of 1808* ;) 1 *Vez. & Beames*, 523.

Upon the first application to dismiss, the plaintiff undertakes to speed the cause. After the expiration of another term, defendant may move it again, and then the undertaking is special. 13 *Vez. jr.* 455 ; 3 *Bro. Ch.* 191.

STORY J. There are two motions before the Court ; one on behalf of all the defendants, except Swan, to dismiss the bill on account of its non-prosecution, and the inability of the plaintiff to procure an appearance and answer from Swan. The other on behalf of the plaintiff, for further time to procure the appearance and answer of Swan, grounded upon the affidavit and papers accompanying the motion.

Upon the actual structure of the bill it is very clear, that Swan is a necessary party, and that no relief can be had against the

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other defendants until the debt is established against him. The whole frame of the bill points to this conclusion, and the process and proceedings to compel Swan to come in all show, that he is deemed an indispensable party, or in the sense of a Court of Chancery, an active, and not merely a passive party. The importance of having the person before the Court, whose interests are to be bound by an account or debt, is very forcibly illustrated by the case of *Fell vs. Brown*, (2 *Brown, Ch. Cas.* 276.)

It is not, however, necessary at this time to enter into any consideration of the question of parties, since the plaintiff, by making Swan a party, is bound to proceed against him as such, or to dismiss him wholly from the bill.

The general principle is perfectly well settled, that the defendant may have the bill of the plaintiff dismissed for non-prosecution, if the plaintiff does not proceed therein within a reasonable time. In *England*, if the plaintiff suffer three terms to elapse after answer filed, without taking any steps in the cause, the defendant may move to have the bill dismissed for want of prosecution. And the plaintiff, upon such an application, can give no other answer than an undertaking to speed the cause. If, after such an undertaking, another term expires without the plaintiff's taking any steps in the cause, the defendant is then entitled again to move for a dismissal, which is granted of course, unless the plaintiff enters into a special undertaking.¹ This practice seems wholly inapplicable to the Circuit Courts of the *United States*; as it would operate the most vexatious and unjustifiable delays, considering the great intervals between the terms of our Courts. The practice, however, such as it is, looks to the case, where a sole defendant answering insists upon the right to dismiss.

The present is a case, where co-defendants, having answered, insist upon the right to dismiss the bill on account of the non-

¹ See *Degebers vs. Lane*, 15 *Vez.* 291.—*Bligh vs. —*, 13 *Vez.* 455.—*Naylor vs. Naylor*, 16 *Vez.* 127.—*Fuller vs. Willis*, 3 *Vez. & Beame*, 1.

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prosecution of the same against *Swan*. It would be an intolerable grievance, if co-defendants could not insist upon such a right; for it might otherwise happen, that the cause could not be brought to a hearing against them alone; and thus they might be held in Court for an indefinite period, perhaps during their whole lives, and very valuable property in their hands be incapable of any safe alienation. No court of justice, and least of all, a Court of equity, could be presumed to suffer its practice to become the instrument of such gross mischief. We accordingly find it very clearly established, that a co-defendant possesses such a right.² That right, however, in *England*, seems governed very nearly, if not altogether, by the same rules, which apply to the case of a single defendant.

It may not be fit for this Court to follow the *English* practice without modification; but the spirit of that practice clearly indicates, that where there has been no affected delay, the rule to dismiss ought not to be peremptory in the first instance. Time ought to be given to the plaintiff to relieve the cause, if possible, from the difficulty of the non-appearance of the other defendant. In the present case the plaintiff has been guilty of no laches. He has used all commendable diligence to procure the appearance of *Swan*. He has sent a commission to give him notice of the suit, and to take his answer. *Swan* has, indeed, declined at present to answer. And if the case stood solely upon the commissioner's return, there would be no use in any farther delay; and the bill might be at once dismissed. But the affidavit of the plaintiff and the other papers accompanying his motion, do not demonstrate a determination on the part of *Swan* never to appear, and make answer to the suit. On the contrary, he expresses a readiness to do so at a future time.

It is true, that under the limited authority confided to the Circuit Courts of the *United States*, *Swan* cannot be compelled to

² *Anon.* 2 *Atk. R.* 604.—*Anon.* 9 *Vez.* 512.

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appear and answer the present bill. I do not now go into a consideration of this subject, having had occasion to express my opinion at large, in the recent case of *Picquet vs. Swan*, (*ante*, p. 35.) But *Swan* may appear, if he chuses, and answer the bill; and if he should so do, there is not, as I conceive, any want of jurisdiction in the Court to entertain the cause.³

I am fully aware of the extreme inconveniences resulting to the co-defendants from this protracted litigation; but the Court is bound to guard itself against any undue influence, which such a circumstance is well calculated to produce. This question must be decided upon principles applicable to all cases of a like nature. Unless *Swan* should appear, there must be a dismissal of the bill. That is the common course, when persons, who are necessary parties, refuse to appear, and the Court has no power to reach them by its process, and compel them to become parties. It was the ultimate fate of the case of *Russell vs. Clarke's Ex'rs*, (7 Cranch, 69,) after it was remanded to the Circuit Court.

What the Court propose to do under all the circumstances of this case, is, to pass an order giving farther time to the plaintiff to procure the appearance and answer of *Swan*, until the rule day in May next; and in case no such appearance and answer shall be filed on or before that time, then, that the plaintiff's bill do stand dismissed without prejudice to the merits, and that the defendants, except *Swan*, do recover their costs.

³ See *Harrison vs. Rowan*, 1 Peters's Cir. R. 489.—*Logan vs. Patrick*, 5 Cranch, 288.—*Pollard vs. Dwight*, 4 Cranch, R. 421.

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UNITED STATES

vs.

WASHINGTON MUNROE AND ELIJAH LORING.

To entitle the *United States* to a priority of payment, under the 65th section of the collection act of 1799, ch. 128, out of funds in the hands of assignees, there must be a general assignment by the debtor of all his property. A partial assignment of a portion, however large, without fraud, is not sufficient.

In what cases a Court of equity will reform a written instrument, upon the ground of mistake. The mistake must be made out by the clearest and most unequivocal evidence.

Semble, that the Court would not reform it to the prejudice of *bona fide* purchasers without notice.

THIS was a bill in equity, brought by the *United States* against the defendants, as assignees of *Samuel Langton*, to enforce their right of priority of payment of debts out of the effects of *Langton*, assigned to the defendants for the payment of his creditors. The cause was brought to a hearing upon the bill, answers and evidence.

Dunlap, District Attorney, for the *United States*.

The celebrated rule of reasoning, laid down by Lord Bacon in his Reading upon the statute of uses, may well be adopted in this case. He says, "The nature of an use is best discerned by considering what it is not, and then what it is; for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives, to what is affirmative and inclusive." So here it would be better ascertained what cases were included within the statutes giving a priority to the *United States*, by first considering what cases were excluded from these statutes. The cases decided against the priority of the *United States*, are, where mortgages and pledges of certain specified property, partial conveyances in the course of business, as contradistinguished from general assignments, have been upheld against the *United States*. In the case of the *United States vs. Hoe et al.*, (3 *Cranch*, 91,) a mortgage of part of the debtor's property was

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upheld, and the Court there say, that "there must be such a general divestment of property as would be equivalent to insolvency in its technical sense," to entitle the *United States* to a priority. In *Bartlett vs. Prince*, (5 *Cranch*, 431,) the Court consider the words "insolvency" and "bankruptcy" as "synonymous," and in *Conard vs. Atlantic Insurance Company*, (1 *Peters*, 439,) the Court say, "insolvency, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency, in its technical sense." In *United States vs. Clarke*, (1 *Paine*, 640,) the Court say, that the omission in an assignment of a part "to evade the statute," is not the only illustration, and that the assignment must be "the assignment of all, as contradistinguished from a partial assignment." In 1 *Cooke's Bankrupt Law*, 102, the distinction is taken between partial assignments which are in the course of fair trade, and those which are considered general and technically total, though there may be omissions of some small portions of a debtor's property. In the latter case, the exceptions or reservations do not prevent the assignment from being considered general. From these authorities it is inferred and contended, that where, instead of a legal insolvency, a party makes a voluntary bankruptcy, and delivers over and assigns the bulk of his property to assignees, to secure the payment of his debts, the assignment is a general, as contradistinguished from a partial one, although there may have been some reservations by the debtor, either with a fraudulent design against the *United States*, or creditors, or from accident. In most cases of assignments, there is a reservation of household furniture, or a small allowance to the insolvent debtor; and if such reservations, as one of a library of books, or a little family plate, and things of that sort, can prevent such assignments from being considered general, the priority of the *United States* in those states where there are no bankrupt laws, is in fact destroyed.

Fletcher, for the defendants, *è contra*.

STORY J. The present bill seeks payment of certain judgment debts due to the *United States* upon custom-house bonds, out of the effects of *Samuel Langton*, assigned to the defendants, *Munroe* and *Loring*. The collection act of 1799, *ch.* 128, § 65, gives a priority of payment to the *United States* in certain cases of insolvency, and among others, in cases “in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors.”

The bill asserts two grounds, upon which the *United States* may maintain their claim. (1.) That there was in this case, a general assignment by *Langton* of all his property; (2.) that it was the intention of all the parties to the assignment, that the clause in the assignment, providing for a priority of payment upon custom-house bonds due to the *United States*, should apply to all the bonds of *Langton* then owing to the custom-house, and not, as the terms of the assignment purport, to those bonds only, upon which *Munroe* was surety.

In cases, where the *United States* seek to enforce such a priority upon the ground of a general assignment, it is necessary, that the bill should expressly aver, that the assignment does cover and convey all the property of the debtor. If the assignment be general in its words, so as to include all his property, the allegation may be in general terms referring to the assignment. But where, as in the present case, the assignment purports upon its face to convey specific property only, and not to be universal in its operation, it is necessary, that there should be a direct averment in the bill, that the assignment did in fact, though not in form, include all the debtor's property, so as to operate virtually as a general assignment. If any portion be omitted fraudulently to evade the statute, or unintentionally and by mistake, when the object was a general assignment, in each of these cases the bill should include an averment to meet the case, and obviate the difficulty.

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So in relation to the case of an asserted mistake in the language of the instrument, differing from the intention of the parties, if the bill seeks to correct that mistake, and reform the instrument, and obtain the consequent relief, it is not sufficient to allege generally, that the intention was different; but there must be an express averment, that the instrument, as existing, differs from the intention of the parties, stating the particulars; and the bill must conclude with a prayer for the correction of the mistake, and a decree according to the reformed instrument. It might be questioned, whether upon a critical examination the averments are so perfectly explicit in this bill, as to preclude all doubt. However, I throw out these observations rather for consideration in other cases, as the parties have taken no objection, and the cause has been argued upon the merits.

There is another question as to parties, whether all the proper parties are now before the Court. *Langton* is no party to the bill, though he has, in writing, expressed a willingness to be made one, and to submit to any decree made by the Court. But he is certainly the primary debtor, and might, if he pleased, contest the debts due to the *United States*, or prove a satisfaction of them. He is certainly, therefore, a proper party for the protection of his own interests, as well as those of the assignees.

But the answer of *Munroe* discloses another important fact; and that is, that since the assignment was made, he has himself become insolvent, and has assigned to certain persons all his property, including all that passed for his benefit under the assignment of *Langton*; and his [*Munroe's*] assignees are not parties to the bill. Now, in point of fact, it appears, that *Munroe* was the principal creditor of *Langton*; that he was also indorser and surety for a large amount; and the assignment of *Langton* provides for the entire payment of all debts due to, and liabilities of *Munroe*, before the satisfaction of any other debts. The answers also establish, that the proceeds of the property under the assignment fall far short of indemnifying *Munroe* for these debts.

and liabilities. The other assignee, *Loring*, is but nominally interested. If, therefore, the object of the present bill be (as it in fact is) to reach the effects of *Langton* in the hands of the assignees of *Munroe*, they ought to be made parties to the bill. If the object were only to charge *Munroe* and *Loring* personally; (the latter does not appear to have any part of the property in his hands,) and to get a decree against them for the amount; it might be otherwise. But as to *Munroe*, a personal decree would be useless, for he is already insolvent.

The questions, however, which the parties before the Court are most anxious to dispose of, if decided in favour of the defendants, will render the further consideration of the question of parties unnecessary. How far, then, are the grounds of the bill maintained, in point of fact and evidence? In the first place, was this the case of a general assignment? The doctrine of the Supreme Court of the *United States*, is, that no assignment is within the statute unless it is general, and include *all* the debtor's property. It must be such an assignment, as amounts to a total divestment of all his interest and estate. If it be a partial assignment only, it is wholly immaterial, how much or how little it includes; whether nine-tenths or ninety-nine hundredths; so always that the omission be not by fraud or mistake. Now, the answer of the defendant *Munroe* utterly denies, that in point of fact the assignment did include all the debtor's property, or was intended to include all. The assignment does not, in form, purport to convey all; but only specific and enumerated portions of property. The whole evidence, including that of *Langton* himself, (who is a witness for the government,) admits, that a small portion was not included. The amount is not great, being about \$1000, and constituting not more than one twentieth of the debtor's property. The omission of this property is proved by all the testimony to have been by design, and not by accident. It was reserved to pay particular creditors, and not fraudulently to evade the statute. How, then, can the Court give effect to this as a

general assignment, when it conveyed a part only of the debtor's property? When the reservation was in good faith, and not by mistake?

In the next place, as to the asserted mistake in the draft of the assignment. The language of the instrument is perfectly unequivocal. In terms, it gives priority of payment to custom-house bonds, on which *Munroe* is surety, estimating them at \$8,400. It is true, that the bonds on which *Munroe* is surety, fall short of that amount; and the bill avers, that all the bonds owing *Langton*, fall short of it. The sum, therefore, was adopted as a conjectural amount, and no light arises from that circumstance. The answer of *Munroe* explicitly denies, that any other bonds than those, on which he was a surety, were intended by the clause, the principal object of the instrument being to give him a universal priority or preference in payment of his debts and liabilities. How is this answer met? By general testimony from one witness, that he understood all bonds were to be included; and by the testimony of *Langton*, to the same effect. But *Langton*, if a competent witness, is not now without some bias; for it is now manifestly his interest to escape from being arrested in execution upon the outstanding judgments of the *United States*; and if taken in execution, he cannot be released except by some act of the government, or its authorized officers.

In cases of asserted mistake in written instruments, it is not denied, that a Court of equity has authority to reform the instrument. But such a Court is very slow in exerting such an authority; and it requires the strongest and clearest evidence to establish the mistake. It is not sufficient, that there may be some reason to presume a mistake. The evidence must be clear, unequivocal and decisive; not evidence which hangs equal, or nearly in equilibrio. Now, in the present case, the scrivener who drew the instrument, has not been examined; and if examined, he could have stated his instructions. And if the draft conformed to the actual instructions given by both parties, and especially by the debtor, any

antecedent loose conversations would not be entitled to much weight. They would be deemed merged in the more deliberate results of the written instrument.

Besides, here the question is not merely a question of the correction of a mistake between the original parties. *Munroe's* assignees and creditors are essentially interested. They may have released their debts upon the faith of the validity of the assignment of *Langton*, in the original shape. Unless they had some notice of the mistake, it would be very difficult, even if they were parties before the Court, to reform the assignment to their prejudice.

As the case is presented before the Court, my judgment is, that the bill ought to be dismissed. But there was reasonable cause for filing the bill, and I shall so certify.

Decree accordingly.

A TABLE

OF THE PRINCIPAL CASES.

ACTION.

Case for a deceit in selling a vessel as a *British* vessel, she being in fact not *British*, or entitled to a *British* national character. It was *held*, that the plaintiff was entitled to damages to the extent of the difference of value of the vessel as sold, and her value, if her real character had been known, and also to such damages as the value of repairs made in her on the faith of the representation of her *British* character, which had not been remunerated by her earnings or in any other way. *Sherwood vs. Sutton.* 1

See PRINCIPAL and AGENT, 1.
JURISDICTION, 3.
BILL OF EXCHANGE, 2.

ADMINISTRATOR.

1. In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and *pro rata* towards the extinguishment of all the debts due to the creditor.

The *United States* having a priority by law in such cases, does not change the rule.

The duty of the administrator is the same. *United States vs. Wardwell.* 82

2. If an *American* administrator procure an auxiliary administration in *England*, and receive from the administrator there the assets collected under such administration, he is chargeable here for the assets so received as administrator. *Pratt vs. Northam.* 95

3. If an administrator be at the same time guardian of the legatees or distributees, and receive foreign assets as abovesaid, and do not inventory or account for them, or procure any settlement of them in the Probate Court, and a distribution of them according to law, he will be deemed to receive them as

administrator, and not to retain them as guardian. Some act or admission, showing a retainer as guardian, as an accounting in the probate office as guardian for the same, is necessary to exonerate him from liability as administrator.

The sureties of an administrator are liable in the same manner as their principal for assets so received, until some act or admission establishing a retainer as guardian. *A fortiori* the rule is so, where the administrator has never admitted the receipt of such assets as guardian or administrator; but fraudulently concealed the fact from all the parties in interest. *Pratt vs. Northam.* 95

4. Where an administrator and his sureties die, a suit brought by a legatee or distributee to recover for the default of the original executor in not paying the same, must be brought against the administrator of the executor, or the executor of his sureties, within three years after the last administration is taken out; otherwise it is barred.

Who are proper parties to be made in such a case? *Pratt vs. Northam.* 95

5. Under the statute of *Rhode Island* for the conveyance of real estate, if there be a defective acknowledgment of the deed, by which the title is intended to be conveyed, the deed is void, as to all persons except the parties and their heirs, and therefore a subsequent purchaser for a valuable consideration from the grantor, may acquire a good title thereto. *Richards vs. Randolph.* 115

ADMIRALTY.

1. The admiralty has jurisdiction over petitory as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession. *Schooner Tilton.* 465

2. The admiralty has jurisdiction in

case of a wrecked ship, to decree a sale upon application of the master. *Schooner Tilton*. 465

8. The sale by an Admiralty Court, of a wrecked ship, upon the application of the master and a survey made, is within its jurisdiction, but is not conclusive upon the owner or upon third persons. *Schooner Tilton*. 465

ALIEN.

Where an alien sues in the Circuit Court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the *United States* is not sufficient. *Picquet vs. Swan*. 35

ASSIGNMENT.

1. A claim of a person to compensation for wrongs done under *Spanish* authority, and provided for by the treaty of 22d of February 1819, with *Spain*, passed to his general assignee upon his insolvency. *United States vs. Hunter*. 62

2. A surety on a custom-house bond, who has paid it, has the same priority, as the *United States*, against the estate of his principal in the hands of his assignee.

If such surety become insolvent, and the same person is assignee of both estates, the funds of the principal to the extent of the debt due such surety, as a priority creditor, is by operation of law deemed assets of the surety; and if the latter is also indebted to the *United States* for other debts, the *United States* may, by a bill in equity against the assignee, ensure its priority out of such fund or assets. *United States vs. Hunter*. 62

3. If, under the act of 24th May, 1824, ch. 140, § 2, the secretary of the treasury omit to retain the amount of debts due to the *United States* from a person entitled, by an award under the *Spanish* treaty, to money provided for payment of such award, it does not prejudice the right of the *United States* to proceed for payment of such debts, against the general assignee, who has received the money from the treasury. *United States vs. Hunter*. 62

4. Wherever the principal can trace his property in the hands of his factor or agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it from the agent, or in case of his failure, from his assignees. *McIntire vs. Curtis*. 80

5. Where a mortgage had been given to one partner to secure a debt of a firm, and after the failure of the firm, and an assignment of the debt, one of the partners entered into an arrangement with the debtor, without the consent of the assignees, by which he took negotiable notes for the debt payable on time, and afterwards he assigned the mortgage to the other partner, who was not party to the arrangement; it was held, that the mortgage was not extinguished. *Osborn vs. Benton*. 157

6. Where goods on consignment at *Boston* were, on the failure of the owners, assigned for the benefit of creditors, and before notice to the consignees of the assignment could be reasonably given, another creditor of the debtor's attached them by a trustee process in *Boston*, the debtor and the creditors being citizens of the state of *Pennsylvania*; it was held, that the assignment, if *bond fide*, was a sufficient title to pass the goods to the assignees, and to overreach the trustee process. *Bholen vs. Cleveland*. 174

7. How far notice of a set-off is necessary to defeat the rights of an assignee. *Greene vs. Darling*. 202

8. *Quare*, whether a party who has procured an assignment of a debt of the plaintiff, can set it off against his own debt due to the plaintiff, which was previously assigned. *Greene vs. Darling*. 202

9. Where the assignee of an insolvent debtor recovers a demand, and expenses are incurred thereby, the latter are a charge on the fund, and the right of priority of payment of the *United States* attaches on the residue.

The *United States* are not bound to contribute, *pro rata*, for the sum due to them. *United States vs. Hunter*. 229

10. Under the trustee process of *Massachusetts* by statute of 1794, ch. 65, if the trustee swears he has no goods, effects, or credits of the debtor in his hands, he is entitled to be discharged, unless, from other parts of his disclosure, that averment is overthrown. *United States vs. Langton*. 289

11. Where an assignment does not, on its face, purport to be of all the debtor's property, it is incumbent on the *United States*, if they insist on a priority of payment under the act of Congress of 1799, ch. 128, § 65, to establish that it does, in fact, contain all the debtor's property.

A small portion left out by mistake or

fraud, will not defeat the priority of the *United States*. *United States vs. Langton*. 289

12. An assignment of *all* the debtor's property in a schedule referred to, which enumerates only specific property and does not purport to be all, affords no presumption that it is all the debtor's property, or a general assignment. *United States vs. Langton*. 289

13. The trustee process lies against assignees in favour of the *United States*, where a debtor makes an assignment of his property in trust to pay custom-house bonds, or other debts due to the *United States*, to attach the funds to the amount of such trust, in the hands of the assignees, notwithstanding at law, the assignment passed the property clothed with the trust, to the assignees. *United States vs. Langton*. 289

14. One of the trusts of an assignment was to pay "8400 dollars on custom-house bonds, on which *M*. is surety," *M* being one of the assignees; he was surety on bonds to a less amount; but the debtor in fact owed bonds to the custom-house, to the amount of 8257 dollars; it was *held*, that no bonds were included in the trust but those on which *M* was surety.

Quare, whether parol evidence is admissible to explain the intent of the parties in the above assignment, so as to show whether *all* bonds were intended to be included, or those only, on which *M* was surety. *United States vs. Langton*. 289

15. Where there is a general assignment of a debtor's property, for the benefit of creditors, and the priority of the *United States* attaches, they having various debts due by bonds, with *different* sureties, all payments made by the assignees are to be applied *pro rata* to all the debts of the *United States*; and the latter are not at liberty to apply the payments in any other manner, without the consent of all the parties in interest. *United States vs. Amory*. 455

16. To entitle the *United States* to a priority of payment, under the 65th section of the collection act of 1799, ch. 128, out of funds in the hands of assignees, there must be a *general* assignment by the debtor of *all* his property. A partial assignment of a portion, however large, without fraud, is not sufficient. *United States vs. Munroe*. 572

ASSIGNEE.

See ASSIGNMENT.

ATTACHMENT.

Under the statute of *Massachusetts* of 1823, ch. 242, giving relief against fraud to secure attaching creditors, it is not necessary, that the second attachment should be returnable to the same term of the Court as the first attachment.

Quare, if the plaintiff must, in all cases under that act, sign and make oath to his petition to be admitted to defend against the first attachment, or it may be done, if he is abroad, by his agent. *Lodge vs. Lodge*. 407

AWARD.

1. An award, upon a submission of a question whether the parties had a right to set off, is conclusive.

Quare, whether a decision, by a court of law, of concurrent jurisdiction on the same point, would not be conclusive. *Greene vs. Darling*. 201

2. When an award directed each party to release to the other certain estate, and the term of 20 days was directed, within which the acts were to be done; the acts are to be deemed concurrent acts, so that neither party can insist upon a release without offering to execute a release on his own part to the other party. *McNeil vs. Magee*. 244

3. Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part. *McNeil vs. Magee*. 244

4. After long delay and laches a court of equity will not decree a specific performance of an award, especially where there has been a material change of circumstances, and injury to the other party.

A fortiori, it will not decree it against purchasers even with notice, if their vendee is dead and insolvent so that they can have no remedy over.

Quare, in what cases a court of equity will award damages as a compensation for delay on a bill for a specific performance. *McNeil vs. Magee*. 244

See DEED, 9.

AGENT.

See PRINCIPAL and AGENT.

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. A bill drawn upon a partnership, but not accepted until after a dissolution of the partnership publicly announced, binds only the partner, who accepts it, and not the other partners, who have not consented thereto. *Tombeckee Bank vs. Dumell.* 56

2. An agent, to whom a negotiable note has been indorsed by his principal for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note.

No person can sue as indorsee, unless he be the owner of the note or has some legal or equitable interest therein. *Thatcher vs. Winslow.* 58

8. Assuming that a foreign bill of exchange, payable after sight, ought to be presented within a reasonable time, that time must be judged of with reference to the usage among merchants as to delays in the negotiation and transmission of such bills. *Wallace vs. Agry.* 118

4. Where a partnership is carried on by a firm in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted as notes binding the firm, upon the representation of the partner giving the same to that effect, and were made for the common benefit and business of the firm. *United States Bank vs. Binney.* 176

5. Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to Africa, &c. and authorized their agent to draw bills for the amount if he fitted out the expedition, and he drew a bill on one of the subscribers for the amount subscribed by him to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was held, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a constructive acceptance of the bill, it having been dishonoured, when presented for acceptance. *Lowber vs. Shaw.* 241

6. Where a note is made payable at a particular place, and the indorser resides there; if the holder remits it to his agent at such place, for payment, and it is dishonoured; the agent is not bound to give notice of the dishonour to the indorser; but his duty is to give

notice to his principal, who may then give notice to the indorser, and if given in due time after the principal has received notice, the indorser is bound. *U. S. Bank vs. Goddard.* 366

7. If due notice is given by a holder to his immediate indorser, of the dishonour of a note, and the latter gives due notice to a prior indorser, the holder may recover against the latter, although he has never given him any notice, for due notice given by any party on the bill, is notice to charge in favour of all subsequent parties. *U. S. Bank vs. Goddard.* 366

BOUNDARY.

1. Where a boundary is disputed between parties, who own adjoining tracts of land, and they agree to erect a fence on what is supposed to be the true boundary and the possession continues according to that line for twenty years, in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one, and to conclude persons claiming under them by subsequent conveyances. *Wakefield vs. Ross.* 16

2. Where A owned the head lot No. 18, and sold to B forty acres on the east end of that lot, and afterwards sold to C by the following description; "a certain tract or parcel of land situate, &c. and contains thirty acres by measure," being "the west part of the head lot No. 18," it not being shown, that the parties at that time knew, that the whole lot contained more than seventy acres, although in fact it did contain more; it was held, that the deed to C conveyed all the land in the lot, not conveyed to A, and was not limited to thirty acres at the west end of the lot. There being actual boundary lines afterwards stated in the same deed, it was farther held, that those boundary lines must govern, even if they included more than thirty acres. *Wakefield vs. Ross.* 16

3. A conveyed to B, by deed, a certain piece of land by specific boundaries, and then added, "it being the same land given by my honoured mother to him the said B, by her last will and testament, said land containing about five acres."

The devise in the will was of "a piece of plain land, of about four or five acres, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch."

It was held, that the latter clause did not control the specific boundaries in the deed, even supposing the will would admit of narrower limits, or was of doubtful construction. *Howell vs. Saule.* 410

BILL OF EXCEPTIONS.

Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained, unless the bill of exceptions is waived. *Cunningham vs. Bell.* 161

BILL OF REVIEW.

1. In what cases a bill of review generally lies.

It lies for matter of error apparent on the face of the record. What is such matter?

The error must appear on the decree and pleadings, for the evidence in the case at large cannot be examined to ascertain, whether the Court misstated or misunderstood the fact.

A bill of review also lies for newly discovered evidence material to the issue, if such evidence was not known until after the period in which it could be used in the cause.

Quare, if such newly discovered evidence must not be some written paper or evidence.

Quare, if newly discovered testimony of witnesses, going to confirm or to contradict the original testimony, is admissible.

No bill of review will lie, if the newly discovered evidence could have been obtained by reasonable diligence before the original hearing.

Quare, whether a bill of review lies upon new matter not in issue in the original cause; but which shows the decree erroneous.

It does not lie, where the party seeks to set out a new title, and not to support the title in the original cause. *Dexter vs. Arnold.* 308

2. A bill of review lies for the party who obtained the original decree in his own favour, if the original decree was injurious to him. *Dexter vs. Arnold.* 303

3. A bill of review lies for error in law only where the original decree is enrolled. If not enrolled, the remedy is a re-hearing.

All decrees in the Courts of the *United States* are deemed to be enrolled at the term in which they were passed. *Dexter vs. Arnold.* 303

4. If the decree be not enrolled, a bill, in the nature of a bill of review, and not strictly a bill of review for newly discovered evidence. *Dexter vs. Arnold.* 308

5. The granting of a bill of review for newly discovered evidence is matter of discretion, and must be brought forward by petition to the Court.

Such a petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree.

It is not sufficient to state, that the petitioner expects to prove certain facts. He must state the exact evidence, to establish them.

On the hearing of such a petition affidavits may be admitted on each side, if necessary to explain the nature of the evidence.

Upon a bill of review for newly discovered evidence, the other party may controvert by plea or answer that it is newly discovered. *Dexter vs. Arnold.* 303

6. Petition of review for matters of fact denied upon all the circumstances of the case. *Dexter vs. Arnold.* 303

BOND.

The act of 1817, ch. 197, respecting the bonds of persons in the navy, having required, that every person then in service &c. shall, instead of the bond required by a former act, enter into a new bond with sureties conditional for the faithful performance of his duties &c., the sureties on the old bond are discharged from all responsibility for monies received by any person &c., after he has given the new bond, the latter being, by the act, a substitute for the former. *United States vs. Wardwell.* 82

CHoses IN ACTION.

See LARCENY, 1.

CIRCUIT COURT.

1. Where a party defendant is a citizen of the *United States*, and resident in a foreign country, not having any inhabitancy in any state of the Union, the Circuit Courts of the *United States* have no power to maintain jurisdiction over him in a suit brought by an alien against him, although he has property within the district, which may be attached. *Picquet vs. Swan.* 85

2. The State Courts have jurisdiction of offences committed on arms of

the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of a county; and in such cases the Circuit Courts of the *United States* have no jurisdiction under the said statute. *United States vs. Grush.* 290

See ALIEN, 1.

CITIZENSHIP.

To constitute a person a citizen of a state, so as to sue in the courts of the *United States*, he must have a domicile in such state.

If he removes into a state *animo manendi*, that is sufficient, whatever may be his motive for removal. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of domicile. *Case vs. Clarke.* 70

COLLECTOR.

See DUTIES.

COMMERCE.

1. An open boat is not a ship or vessel within the purview of the statutes of 1820, ch. 122, and 1823, ch. 150, which prohibit commercial intercourse from the *British* colonies.

It seems that, notwithstanding those statutes, open *British* boats may visit the *United States*, if not destined for trade.

British ships or vessels excluded from our ports by those statutes, are such as are owned by *British* subjects, having a *British* domicile, and sailing under the *British* flag, and not ships or vessels owned by *British* subjects domiciled in the *United States*. *United States vs. An Open Boat.* 120

2. Under the act of 15th of March 1820, ch. 122, prohibiting commercial intercourse from the *British* colonies in *British* ships, *British* owned vessels are included in the prohibition, although not registered or navigated according to the *British* navigation and registry acts.

But open boats, without decks, are not included in the prohibition.

The forfeiture, under the act, attaches to the cargo on board at the time the vessel enters, or attempts to enter our ports; and not to any cargo subsequently taken on board, though on board at the time of the seizure. *United States vs. An Open Boat.* 232

CONSIGNOR AND CONSIGNEE.

1. Where a voyage was undertaken to *Havana*, and thence to *Leghorn* and back, and the owners ordered the consignees at *Leghorn* to apply their funds, estimated at 4600 pezzos, to the purchase, first of 2200 pezzos value of tiles, and the residue to invest in paper; and the consignees accepting the orders, invested the whole funds in paper, because they fell short of the estimated sum, although a sum of 1750 pezzos might have been so invested; it was held, that the consignees were liable in damages, for the breach of orders.

The damages, in such case, are not to be confined to the transactions at *Leghorn*; but are to be calculated upon the actual injury to the plaintiffs, in the events of the voyage, taking into consideration the markets at *Havana*, and all the other circumstances.

The receipt of the proceeds of the paper, after sale, by the master at *Havana*, is not, in point of law, *per se*, a ratification of the purchase, and investment in paper by the owners. *Cunningham vs. Bell.* 161

2. By the act of Congress of 1790, ch. 128, consignees are authorized to enter goods, and give bonds for the duties. In such case the *United States* have no remedy over against the owner of the goods, for whom the consignee acts as agent or trustee, if the duties are not paid. *Knox vs. Devens.* 380

3. If a surety for a consignee on a custom-house bond pays the debt, he has no remedy against the owner for the amount, if the latter did not request the surety to sign the bond; but the remedy for the surety is against the consignee only. *Knox vs. Devens.* 380

See ASSIGNMENT, 6.

CONTRACT.

Where a contract is made between citizens of the same State, and the defendant is afterwards discharged under the insolvent act of such State from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought in another State, according to the *lex fori*. *Titus vs. Hobart.* 378

CONVEYANCE.

1. Where a boundary is disputed between parties, who own adjoining tracts of land, and they agree to erect a fence on what is supposed to be the true boundary, and the possession continues according to that line for twenty years, in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one, and to conclude persons claiming under them by subsequent conveyances.

Wakefield vs. Ross. 16

2. Under the statute of *Rhode Island* for the conveyance of real estate, if there be a defective acknowledgment of the deed, by which the title is intended to be conveyed, the deed is void, as to all persons except the parties and their heirs, and therefore a subsequent purchaser for a valuable consideration from the grantor, may acquire a good title thereto. *Richards vs. Randolph.* 115

3. A lease for 500 years of certain land covered with a pond of water conveys, as incident, the water and the fish therein. *Smith vs. Miller.* 191

COUNTY.

Where an arm of the sea or creek, haven, basin, or bay is so narrow that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county.

In such waters it seems, that the admiralty and common law courts have concurrent jurisdiction. *United States vs. Grush.* 290

COUNTY OF SUFFOLK.

The county of Suffolk, in which the city of *Boston* is included, extends to all waters between the circumjacent islands, down to the *Great Brewster*, and *Point Allerton*. *United States vs. Gursh.* 290

CUSTOM-HOUSE BOND.

See SURETY, 1.

DAMAGES.

Case for a deceit in selling a vessel as a *British* vessel, she being in fact not *British*, or entitled to a *British* national character. It was held, that the plaintiff was entitled to damages to the extent of the difference of value of the vessel as sold, and her value, if her real character had been known, and also

to such damages as the value of repairs made in her on the faith of the representation of her *British* character, which had not been remunerated by her earnings or in any other way. *Sherwood vs. Sutton.* 1

See CONSIGNOR, 1.

NEW TRIAL, 2.

DEED.

1. Where *A* owned the head lot No. 18, and sold to *B* forty acres on the east end of that lot, and afterwards sold to *C* by the following description; "a certain tract or parcel of land situate, &c. and contains thirty acres by measure," being "the west part of the head lot No. 18," it not being shown, that the parties at that time knew, that the whole lot contained more than seventy acres, although in fact it did contain more; it was held, that the deed to *C* conveyed all the land in the lot, not conveyed to *A*, and was not limited to thirty acres at the west end of the lot. There being actual boundary lines afterwards stated in the same deed, it was farther held, that those boundary lines must govern, even if they included more than thirty acres. *Wakefield vs. Ross.* 16

2. Where a party is disseized, he cannot convey by a quitclaim deed his title to the premises of which he is disseized. *Wakefield vs. Ross.* 16

3. A delivery of a deed is essential to its validity. If it be delivered as an escrow on conditions, those conditions must be complied with before it can take effect, as a deed. *Carr vs. Horie.* 60

4. If an instrument be signed and sealed by the grantor, but is left with a third person, without any express or implied authority to deliver it to the grantee, it is not presently the deed of the grantor. *Carr vs. Horie.* 60

5. By the statute of *Rhode Island* respecting conveyances of real estate, no deed of the wife's estate by the husband and wife, conveys any title but that of the husband, unless the same deed be duly acknowledged by the wife, before a magistrate, in the manner prescribed by the statute. *Manchester vs. Hough.* 67

6. By the customary and ancient law of *Rhode Island*, a feme covert may pass her estate by a deed, in which her husband is joined, which is duly executed and acknowledged. *Manchester vs. Hough.* 67

7. Under the statute of *Rhode Isl-* and for the conveyance of real estate, if there be a defective acknowledgment of the deed, by which the title is intended to be conveyed, the deed is void, as to all persons except the parties and their heirs, and therefore a subsequent purchaser for a valuable consideration from the grantor, may acquire a good title thereto. *Richards vs. Randolph.* 115

8. A liberty granted in a deed "to dig a canal through the grantor's land," does not include, as an incident, the proprietary interest in the soil, when dug up and removed. *Lyman vs. Arnold.* 195

9. In what cases the registry of a deed is constructive notice.

The registry of a deed or paper not duly or legally recorded, is not constructive notice.

Quere, if an award respecting real estate is required to be registered by the laws of *Massachusetts*. *McNeil vs. Magee.* 244

10. *A* conveyed to *B*, by deed, a certain piece of land by specific boundaries, and then added, "it being the same land given by my honoured mother to him the said *B*, by her last will and testament, said land containing about five acres."

The devise in the will was of "a piece of plain land, of about four or five acres, lying a little northwestwardly from the aforesaid lots, and reaching back to a ditch."

It was *held*, that the latter clause did not control the specific boundaries in the deed, even supposing the will would admit of narrower limits, or was of doubtful construction. *Howell vs. Saule.* 410

DEVISE.

The testator devised all his estate to his wife for life; if she died before his son *J* arrived of age, then to his daughter *A*, until *J* came of age; at that time the estate to be divided among his three children equally in fee, or to the survivors of them, if either should die leaving no issue. If all his children should die and *leave no issue*, and his wife should survive them, then to her in fee. *Held*, that the devise might be construed, (subject to the wife's life estate,) either as a devise to all the children in fee absolutely, on *J*'s arrival of age, even though the wife was then living, and if they all died before

that period without issue, then to his wife in fee, or as a devise of the estate to the children in fee determinable on their dying in her lifetime without leaving issue, and in that event an executory devise over to her in fee. But if neither construction could be adopted, then, as all the children died in the wife's lifetime, but two of them left issue who survived her, the estate in the event must be considered as intestate estate undisposed of by the will, inasmuch as the devise over to the wife could not take effect. *Nightingale vs. Sheldon.* 336

DISSEIZEN.

Where a party is disseized, he cannot convey by a quitclaim deed his title to the premises of which he is disseized. *Wakefield vs. Ross.* 16

DISTRICT.

The judiciary act of 1789, ch. 20, does not contemplate compulsive process against any person in any district, unless he be an inhabitant of, or found within, the same district at the time of serving the writ. *Picquet vs. Swan.* 85

DOMICIL.

1. The act of *Massachusetts* of 1797, ch. 50, prescribing the modes of serving process, does not apply to a case where the defendant has been an inhabitant, but at the time of the suit brought has his actual domicile in another state, or country. *Picquet vs. Swan.* 85

2. To constitute a person a citizen of a state, so as to sue in the courts of the *United States*, he must have a domicile in such state.

If he removes into a state *animo manendi*, that is sufficient, whatever may be his motive for removal. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of domicile. *Case vs. Clarke.* 70

3. An open boat is not a *ship* or *vessel* within the purview of the statutes of 1820, ch. 122, and 1823, ch. 150, which prohibit commercial intercourse from the *British* colonies.

It seems that, notwithstanding those statutes, open *British* boats may visit the *United States*, if not destined for trade.

British ships or vessels excluded from our ports by those statutes, are such as are owned by *British* subjects, hav-

ing a *British* domicil, and sailing under the *British* flag, and not ships or vessels owned by *British* subjects domiciled in the *United States*. *United States vs. An Open Boat*. 120

DUTIES.

1. Under the Tariff act of 22d of May 1824, ch. 136, bombazines, being goods of which wool is a component material, are liable to pay a duty of 30 per cent. *United States vs. Clarke*. 80

2. By the act of Congress of 1799, ch. 128, consignees are authorized to enter goods, and give bonds for the duties. In such case the *United States* have no remedy over against the owner of the goods, for whom the consignee acts as agent or trustee, if the duties are not paid. *Knox vs. Devens*. 380

3. If a surety for a consignee on a custom-house bond pays the debt, he has no remedy against the owner for the amount, if the latter did not request the surety to sign the bond; but the remedy for the surety is against the consignee only. *Knox vs. Devens*. 380

4. If a collector of the customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared upon as a subsisting deed; for the cancellation is, in such a case, a flagrant violation of duty. *Johnson in Error vs. United States*. 425

5. A collector of the customs is not at liberty to receive any thing but money of the *United States*, or foreign gold or silver coin made current, in payment of duties.—If he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged; *a fortiori*, it is not discharged by the receipt of a memorandum check. *Johnson in Error vs. United States*. 425

6. The receipt of a collector acknowledging payment is *prima facie* evidence, but not conclusive of the fact of payment. *Johnson in Error vs. United States*. 425

7. A collector, like other public officers, cannot bind the *United States* by any acts beyond, or contrary to, the authority given him by the laws. *Johnson in Error vs. United States*. 425

8. *Quare*, whether a collector is not to all intents *functus officio*, as soon as a removal takes place by the appoint-

ment of another person in his stead. *Johnson in Error vs. United States*. 425

EQUITY.

1. A bill in equity was brought against a *feme sole* to compel her to make an acknowledgment of a deed made by her and her late husband in his lifetime, of her land, on a sale thereof. In her answer, she denied all equity; and asserted, that the sale was without her consent, and that she received no part of the consideration money. It was held, that the plaintiffs were not entitled to any relief. *Town of Providence vs. Manchester*. 59

2. The courts of the *United States*, as courts of equity, possess jurisdiction to maintain suits in favour of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favour of the party. This class of cases is of concurrent and not of exclusive jurisdiction. *Pratt vs. Northam*. 95

3. A bill for a discovery of assets lies in equity, notwithstanding a remedy at law. *Pratt vs. Northam*. 95

4. The statute of limitations binds courts of equity as well as law in cases of concurrent jurisdiction; and sometimes, by way of analogy, binds equitable titles.

The statute of limitations of *Rhode Island*, of suits brought against executors and administrators, is a good bar in equity as well as at law. *Pratt vs. Northam*. 95

5. In cases of concurrent jurisdiction, such as accounts, bailments, &c. courts of equity construe the statute of limitations as courts of law do, and create no other exceptions, than those created by the statute. Courts of equity, in such cases, act in *obedience* to the law, and not merely in *analogy* to the law. *Sherwood vs. Sutton*. 142

6. Courts of equity, independently of any statute of set-off, do not exercise jurisdiction to set off mutual disconnected debts, unless where the dealings of the parties imply it as matter of agreement, or *mutual credit*.

Quare, whether in *Rhode Island*, judgments can be set off against each other, where the debt due to the plaintiff has been assigned before suit brought. *Greene vs. Darling*. 201

7. Where a set-off or defence to a

debt was available at law, and the party omitted by laches to take advantage of it, it seems a court of equity will not relieve him. *Greene vs. Darling*. 202

8. Bill for a reconveyance of an estate upon an agreement and subsequent award, dismissed upon the circumstances, the bill being brought against purchasers after a considerable lapse of time, the original vendee being dead and insolvent. *McNeil vs. Magee*. 244

9. Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part. *McNeil vs. Magee*. 244

10. After long delay and laches a court of equity will not decree a specific performance of an award, especially where there has been a material change of circumstances, and injury to the other party.

A fortiori, it will not decree it against purchasers even with notice, if their vendee is dead and insolvent so that they can have no remedy over.

Quare, in what cases a court of equity will award damages, as a compensation for delay, on a bill for a specific performance. *McNeil vs. Magee*. 244

11. If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants who have appeared and answered the bill, may move for a dismissal of the suit for non-prosecution of the bill, against the non-appearing defendant; and the Court will grant a further time for the appearance of such defendant, if it seems reasonable, after which the bill is to be dismissed, unless such defendant appears and answers. *Picquet, Adm. vs. Swan*. 561

12. In what cases a Court of equity will reform a written instrument, upon the ground of mistake. The mistake must be made out by the clearest and most unequivocal evidence.

Semble, that the Court would not reform it to the prejudice of *bona fide* purchasers without notice. *United States vs. Munroe*. 572

See EVIDENCE, 5.

ESTATE.

A liberty granted in a deed "to dig a canal through the grantor's land," does not include, as an incident, the proprietary interest in the soil, when dug up and removed. *Lyman vs. Arnold*. 195

ESTOPPEL.

See PLEADING, 6.

EVIDENCE.

1. Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses. *Wakefield vs. Ross*. 16

2. The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances, which lead to a contrary presumption. *U. S. Bank vs. Binney*. 176

3. Where goods are seized, and claimed as forfeited as part of the cargo, the *onus probandi* is on the government to prove, that such goods were part of the cargo on board at the time of the offence.

The claimant may file a special defence on that point, if he chooses; but it is also in issue on the general denial of the allegations of the libel. *United States vs. An Open Boat*. 282

4. Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to Africa, &c. and authorized their agent to draw bills for the amount if he fitted out the expedition, and he drew a bill on one of the subscribers for the amount subscribed by him, to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was held, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a constructive acceptance of the bill, it having been dishonoured, when presented for acceptance. *Lomber vs. Shaw*. 241

5. If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and if not admitted by the answer, he must prove the notice before he can have relief.

A purchaser, who chooses to answer the bill generally, need not aver, that he is a purchaser without notice. The plaintiff must prove notice.

Notice, if denied by the answer, must be proved by two witnesses, or by one witness and circumstances. *McNeil vs. Magee.* 244

6. Notwithstanding an order of the Court, closing all testimony in a cause, after a limited time, under a commission, the Court will enlarge it, upon proof of newly discovered evidence, which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. *Schooner Ruby.* 451
See ASSIGNMENT, 11, 12, 18.

EXECUTOR.

See ADMINISTRATOR, 4.

FACTOR.

See PRINCIPAL and AGENT, 3.

FISHERY.

A lease for 500 years of certain land covered with a pond of water conveys as incident the water and the fish therein. *Smith vs. Miller.* 191

GUARDIAN.

See ADMINISTRATOR, 3.

HIGH SEAS.

The words "high seas" in the crimes statute of 2825, ch. 876, § 22, mean the uninclosed waters of the ocean on the sea-coast outside of the *fauces terræ*. *United States vs. Grush.* 290

See PERSONAL GOODS, 1.

HUSBAND AND WIFE.

1. By the statute of *Rhode Island* respecting conveyances of real estate, no deed of the wife's estate by the husband and wife, conveys any title but that of the husband, unless the same deed be duly acknowledged by the wife, before a magistrate, in the manner prescribed by the statute. *Manchester vs. Hough.* 67

2. By the customary and ancient law of *Rhode Island*, a feme covert may pass her estate by a deed, in which her husband is joined, which is duly executed and acknowledged. *Manchester vs. Hough.* 67

INDICTMENT.

See PLEADING, 7.

INSANITY.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such in-

sanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors. *United States vs. Drew.* 28

See PERSONAL GOODS, 1.

INSOLVENCY.

1. A claim of a person to compensation for wrongs done under *Spanish* authority, and provided for by the treaty of 22d of February 1819, with *Spain*, passed to his general assignee upon his insolvency. *United States vs. Hunter.* 62

See SURETY, 1.

INSOLVENT ESTATE.

In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and *pro rata* towards the extinguishment of all the debts due to the creditor.

The *United States* having a priority by law in such cases, does not change the rule.

The duty of the administrator is the same. *United States vs. Wardwell.* 82

INTEREST.

See TRUSTEE, 1.

INTESTATE ESTATE.

The statutes of *Rhode Island* of 1768 and 1822, respecting the estates of persons dying without leaving known heirs or representatives within the *United States*, apply to cases, where the person so dying was possessed of an undivided moiety of an estate, as well as to cases, where he held the whole. And to cases where the unknown heir or representative would take an undivided portion, as well as where he would take the *whole* of the estate descended.

Quære, whether the statutes apply to any cases, where the heirs remove from the state, after the death of the person from whom they take. *Stevens vs. Ruggles.* 221

INHABITANCY.

See JURISDICTION, 1.

PROCESS, 1.

TRESPASS, 1.

JUDGMENT.

A judgment in the court of probate of

a state is not conclusive, where it has been obtained by fraud. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive. *Pratt vs. Northam.* 95

JURISDICTION.

1. Where a party defendant is a citizen of the *United States*, and resident in a foreign country, not having any inhabitancy in any state of the Union, the Circuit Courts of the *United States* have no power to maintain jurisdiction over him in a suit brought by an alien against him, although he has property within the district, which may be attached. *Picquet vs. Swan.* 35

2. Where a *Spanish* vessel was captured by a *Colombian* privateer, and by collusion between the captors and an *American* citizen she was purposely wrecked on a key on the coast of *Florida*, within the territory of the *United States*, and the cargo was there landed, and the duties regularly paid; and afterwards the cargo was sold, and the *American* citizen became a purchaser thereof, and gave bills of exchange drawn by himself on a house in *Charleston, South Carolina*, which were dishonoured; it was held, that the party was liable to be sued on such bills in an *American* court, and that the collusion between him and the captors, in procuring the shipwreck, was no bar to a recovery in such suit, as there was no fraud intended, or perpetrated on the laws of the *United States*. *Hopner vs. Appleby.* 71

3. The courts of the *United States*, as courts of equity, possess jurisdiction to maintain suits in favour of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favour of the party. This class of cases is of concurrent and not of exclusive jurisdiction. *Pratt vs. Northam.* 95

4. The State Courts have jurisdiction of offences committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of a county; and in such cases the Circuit Courts of the *United States* have no jurisdiction under the said statute. *United States vs. Grush.* 290

5. Where an arm of the sea or creek,

haven, basin, or bay is so narrow that a person standing on one shore can reasonably discern, and distinctly see, by the naked eye, what is doing on the opposite shore, the waters are within the body of a county.

In such waters, it seems, that the admiralty and common law courts have concurrent jurisdiction. *United States vs. Grush.* 290

6. The grant of administration to a husband on his wife's estate with the will annexed, by a Probate Court, is conclusive to establish her right to make the will, for the general jurisdiction includes the right to inquire into this fact. *Cassels vs. Vernon.* 332

7. The offence of larceny is not punishable under the act of 1790, ch. 9, [36,] unless committed in a place under the sole and exclusive jurisdiction of the *United States*; and to bring the case within the statute there must be an averment of such sole and exclusive jurisdiction in the indictment.

"Personal goods," in that statute, do not include choses in action, the latter not being the subject of larceny at the common law. *United States vs. Davis.* 356

8. Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the *United States*, it may yet be punishable under the third section of the act of 1825, ch. 276.

Offences are punishable under that section according to the state laws, where they are committed, under circumstances, or in places, in which, before that act, no Court of the *United States* had authority to punish them. *United States vs. Davis.* 356

9. It seems that a reservation on a cession of "concurrent jurisdiction," to serve state process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the *United States* over the ceded place. It merely operates as a condition of the grant. *United States vs. Davis.* 356

10. The admiralty has jurisdiction over petitory as well as possessory suits, to reinstate owners of ships, who have been wrongfully displaced from their possession. *Schooner Tilton.* 465

11. The admiralty has jurisdiction in case of a wrecked ship, to decree a sale upon application of the master. *Schooner Tilton.* 465

12. The sale by an Admiralty Court,

of a wrecked ship, upon the application of the master and a survey made, is within its jurisdiction, but is not conclusive upon the owner or upon third persons. *Schooner Tilton.* 465

See PROCESS, 1.

EQUITY, 6, 9.

TRESPASS, 1.

LARCENY.

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2. Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the *United States*, it may yet be punishable under the third section of the act of 1825, ch. 276.

Offences are punishable under that section according to the state laws, where they are committed, under circumstances, or in places, in which, before that act, no Court of the *United States* had authority to punish them. *United States vs. Davis.* 356

MERCHANTS' ACCOUNTS.

A special contract between ship-owners and a shipper of goods, to receive half profits in lieu of *freight* on the shipment for a foreign voyage, is not a case of merchants' accounts, within the exception of the statute of limitations. *Spring vs. Gray.* 505

MORTGAGE.

A statute sale, if fraudulent, will not bind the owner, unless in favour of a *bonâ fide* purchaser, for a valuable consideration, without notice, actual or constructive, of the fraud.

What is such notice? *Schooner Tilton.* 465

See PARTNERSHIP, 2.

MURDER.

Where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors. But it is otherwise, if he be at the time

intoxicated, and his insanity be directly caused by the immediate influence of such liquors. *United States vs. Drew.* 28

NEW TRIAL.

1. Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained, unless the bill of exceptions is waived. *Cunningham vs. Bell.* 161

2. A new trial will not be granted on account of excessive damages, unless the jury have mistaken the principles of law, which ought to regulate damages, or have been guilty of some gross error, which shows an improper feeling or bias on their part. *Thurston vs. Martin.* 497

PARTNERSHIP.

1. A bill drawn upon a partnership, but not accepted until after a dissolution of the partnership publicly announced, binds only the partner, who accepts it, and not the other partners, who have not consented thereto. *Tombeckee Bank vs. Dumell.* 56

2. Where a mortgage had been given to one partner to secure a debt of a firm, and after the failure of the firm, and an assignment of the debt, one of the partners entered into an arrangement with the debtor, without the consent of the assignees, by which he took negotiable notes for the debt payable on time, and afterwards he assigned the mortgage to the other partner, who was not party to the arrangement; it was held, that the mortgage was not extinguished. *Osborn vs. Benson.* 157

3. Where a partnership is carried on by a firm in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted as notes binding the firm, upon the representation of the partner giving the same to that effect, and were made for the common benefit and business of the firm. *United States Bank vs. Binney.* 176

4. *Secret* partnership means, in common usage, a partnership, where some of the partners are kept *secret*, or are unknown, in contradistinction to open or notorious partnership. Where one partner publicly avows all the partners, so that they become and are known as such, and credit is obtained thereby, it is no longer a secret partnership, whether the firm be carried on in the

name of one partner only or otherwise.

U. S. Bank vs. Binney. 176

5. The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein ; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances, which lead to a contrary presumption. *U. S. Bank vs. Binney.* 176

6. One partner can bind the other only for objects within the scope of the business of the firm. Secret restrictions of the rights of partners do not affect those persons, who deal with the firm in ignorance of them. *U. S. Bank vs. Binney.* 177

7. If a company by the articles of partnership do their business by agents, and among other officers by a treasurer, and one of the partners is appointed treasurer, and afterwards fails, owing the partnership, as treasurer, the company have a right to claim payment of the debt out of the *separate* estate of such partner, in the hands of his assignees. And if the debt is transferred, the same right attaches to the holder. *Brown vs. Curtis.* 421

PERSONAL GOODS.

Money and bank notes and coin are "personal goods," within the meaning of the sixteenth section of the crimes act of 1790, ch. 36, respecting stealing and purloining on the high seas. *United States vs. Moulton.* 537

PAYMENTS, APPLICATION OF.

1. Advances made on account generally, for work done under several distinct contracts, some of which have not been completed, must be applied in the first place to the extinguishment of the amounts due on the contracts which have been completed, and not of those which have not been completed. *McDowell vs. The Blackstone Canal Company.* 11

2. In case of payments by a debtor to a creditor, the debtor has a right to direct the application of them, and if he does not, the creditor may apply them as he pleases. *United States vs. Wardwell.* 82

3. In cases of payments to the treasury department, the officers of that department have not a right to make any application of such payments against the will of the debtor, or of his administrator. *United States vs. Wardwell.* 82

4. In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and *pro rata* towards the extinguishment of all the debts due to the creditor.

The *United States* having a priority by law in such cases, does not change the rule. The duty of the administrator is the same. *United States vs. Wardwell.* 82

5. In cases of running accounts, where debits and credits are made at different times, the payments are to be deemed as made towards items antecedently due, in the order of time, in which they stand in the account.

The case of the *United States* furnishes no exception to this rule in cases of running accounts. All payments are deemed to be made on general account. *United States vs. Wardwell.* 82

6. Where there is a general assignment of a debtor's property, for the benefit of creditors, and the priority of the *United States* attaches, they having various debts due by bonds, with different sureties, all payments made by the assignees are to be applied *pro rata* to all the debts of the *United States* ; and the latter are not at liberty to apply the payments in any other manner, without the consent of all the parties in interest. *United States vs. Amory.* 455

PLEADING.

1. Where an alien sues in the Circuit Court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the *United States* is not sufficient. *Picquet vs. Swan.* 35

2. In *New Hampshire*, in an action on the case, for a deceitful representation in a sale, the statute of limitations was pleaded in bar. The plaintiff replied, that there was a fraudulent concealment of the deceit, until within six years. It was *held*, that the replication was a good answer to the plea. *Sherwood vs. Sutton.* 143

3. Where goods are seized, and claimed as forfeited as part of the cargo, the *onus probandi* is on the government to prove, that such goods were part of the cargo on board at the time of the offence.

The claimant may file a special defence on that point, if he chooses ; but it is also in issue on the general denial of the allegations of the libel. *United States vs. An Open Boat.* 232

4. If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and if not admitted by the answer, he must prove the notice before he can have relief.

A purchaser, who chooses to answer the bill generally, need not aver, that he is a purchaser without notice. The plaintiff must prove notice.

Notice, if denied by the answer, must be proved by two witnesses, or by one witness and circumstances. *McNeil vs. Magee.* 244

5. Upon a demurrer to evidence, the party demurring is bound to admit all the facts which the evidence on the other side conduces to prove; and the Court on such a demurrer will infer them in his favor. *Johnson in Error vs. United States.* 425

6. The government is not ordinarily bound by an estoppel. *Johnson in Error vs. United States.* 425

7. It is no defence to an indictment for forcibly obstructing or impeding an officer of the Customs in the discharge of his duties, that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged. *United States vs. Keen.* 458

PRACTICE.

1. Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained, unless the bill of exceptions is waived. *Cunningham vs. Bell.* 161

2. A bill of review lies for error in law, only where the original decree is enrolled. If not enrolled, the remedy is a re-hearing.

All decrees in the Courts of the *United States* are deemed to be enrolled at the term in which they were passed. *Dexter vs. Arnold.* 803

3. Where a contract is made between citizens of the same State, and the defendant is afterwards discharged under the insolvent act of such State from imprisonment, and his person is exempted from future imprisonment thereon; still, if the contract itself is not discharged, a general judgment will be entered against him upon a suit brought

in another State, according to the *lex fori.* *Titus vs. Hobart.* 878

4. No State regards the forms or modes of remedies in other States to enforce contracts; but acts upon its own processes only. *Titus vs. Hobart.* 878

5. Notwithstanding an order of the Court, closing all testimony in a cause, after a limited time, under a commission, the Court will enlarge it, upon proof of newly discovered evidence, which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. *Schooner Ruby.* 451

6. If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants, who have appeared and answered the bill, may move for a dismissal of the suit for non-prosecution of the bill, against the non-appearing defendant; and the Court will grant a further time for the appearance of such defendant, if it seems reasonable, after which the bill is to be dismissed, unless such defendant appears and answers. *Picquet, Adm. vs. Swan.* 561

See NEW TRIAL, 2.

PRINCIPAL AND AGENT.

1. An agent, to whom a negotiable note has been indorsed by his principal for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note.

No person can sue as indorsee, unless he be the owner of the note or has some legal or equitable interest therein. *Thatcher vs. Winslow.* 58

2. Wherever the principal can trace his property in the hands of his factor or agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it from the agent, or in case of his failure, from his assignees. *McIntire vs. Curtis.* 80

3. What circumstances amount to a ratification of a breach of orders.

The omission to answer a letter acknowledging the breach of orders, or the omission to state to the party in a letter of complaint, that he will be held responsible, is not, *per se*, a ratification; but the question is open to the jury, as a matter of fact, whether such ratification ought, under all the circumstances, to be presumed. *Cunningham vs. Bell.* 161

4. Where a sale was made by an administrator, at public auction, of the real estate of his intestate, under a license of the proper Court, to pay debts, and he acted as auctioneer at the sale; it was held, that a memorandum by him of the sale at the time, was not binding on the purchaser, who bid at the sale, and that he was not his agent so as to make the sale a valid contract under the statute of frauds of *Rhode Island*.

No memorandum under the statute of frauds is sufficient, unless it state the price and material terms of the contract for the sale of lands. *Smith vs. Arnold*.

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See PARTNERSHIP, 7.

PRIORITY OF THE UNITED STATES.

1. A surety on a custom-house bond, who has paid it, has the same priority, as the *United States*, against the estate of his principal in the hands of his assignee.

If such surety become insolvent, and the same person is assignee of both estates, the funds of the principal, to the extent of the debt due such surety, as a priority creditor, is by operation of law deemed assets of the surety; and if the latter is also indebted to the *United States* for other debts, the *United States* may, by a bill in equity against the assignee, ensure its priority out of such fund or assets. *United States vs. Hunter*.

62

2. Where the assignee of an insolvent debtor recovers a demand, and expenses are incurred thereby, the latter are a charge on the fund, and the right of priority of payment of the *United States* attaches on the residue.

The *United States* are not bound to contribute, *pro rata*, for the sum due to them. *United States vs. Hunter*. 229

3. Where an assignment does not, on its face, purport to be of all the debtor's property, it is incumbent on the *United States*, if they insist on a priority of payment under the act of Congress of 1799, ch. 128, § 65, to establish that it does, in fact, contain all the debtor's property.

A small portion left out by mistake or fraud, will not defeat the priority of the *United States*. *United States vs. Langton*.

289

4. To entitle the *United States* to a priority of payment, under the 65th section of the collection act of 1799, ch. 128, out of funds in the hands of

assignees, there must be a *general assignment* by the debtor of *all* his property. A partial assignment of a portion, however large, without fraud, is not sufficient. *United States vs. Munroe*.

572

See ASSIGNMENT, 15.

PROBATE COURT.

1. A judgment in the court of probate of a state is not conclusive, where it has been obtained by fraud. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive. *Pratt vs. Northam*.

95

2. The grant of administration to a husband on his wife's estate with the will annexed, by a Probate Court, is conclusive to establish her right to make the will, for the general jurisdiction includes the right to inquire into *this fact*. *Cassels vs. Vernon*.

352

PROCESS.

1. The judiciary act of 1789, ch. 20, does not contemplate *compulsive process* against any person in any district, unless he be an inhabitant of, or found within, the same district at the time of serving the writ. *Picquet vs. Swan*. 35

2. The act of *Massachusetts* of 1797, ch. 50, prescribing the modes of serving process, does not apply to a case where the defendant has been an inhabitant, but at the time of the suit brought has his actual domicil in another state, or country. *Picquet vs. Swan*. 35

PROMISSORY NOTE.

See BILL OF EXCHANGE.

RELEASE.

Where an award directed each party to release to the other certain estate, and the term of 20 days was directed, within which the acts were to be done; the acts are to be deemed concurrent acts, so that neither party can insist upon a release without offering to execute a release on his own part to the other party. *McNeil vs. Magee*. 244

REVOLT.

See SHIPS and SHIPPING, 3, 4, 5, 7.

SEAMEN.

See SHIPS and SHIPPING.

SET-OFF.

1. Courts of equity, independently of any statute of set-off, do not exercise

jurisdiction to set off mutual disconnected debts, unless where the dealings of the parties imply it as matter of agreement, or *mutual credit*.

Quære, whether in *Rhode Island*, judgments can be set off against each other, where the debt due to the plaintiff has been assigned before suit brought. *Greene vs. Darling*. 201

2. An award, upon a submission of a question whether the parties had a right to set off, is conclusive.

Quære, whether a decision, by a court of law, of concurrent jurisdiction on the same point, would not be conclusive. *Greene vs. Darling*. 201

3. How far notice of a set-off is necessary to defeat the rights of an assignee. *Greene vs. Darling*. 202

4. *Quære*, whether a party who has procured an assignment of a debt of the plaintiff, can set it off against his own debt due to the plaintiff, which was previously assigned. *Greene vs. Darling*. 202

5. Where a set-off or defence to a debt was available at law, and the party omitted by laches to take advantage of it, it seems a court of equity will not relieve him. *Greene vs. Darling*. 202

SHIPS AND SHIPPING.

1. Under the 10th section of the act of 1825, ch. 67, [276] the forcing a mariner on shore must be done, not only without justifiable cause, but also maliciously, to justify a conviction. If done under a mistaken sense of duty, it is not a case for conviction.

"Maliciously" in the statute, means, with a wilful disregard of right and duty, or doing the act against a man's own conviction of duty. *United States vs. Ruggles*. 192

2. A master of a ship has authority to confine his seamen in a common goal, in a foreign port, for offences and misconduct, in extreme cases, and where the proper correction or punishment cannot be effectual on shipboard. *United States vs. Ruggles*. 192

3. The crew of a ship who have signed shipping articles for the voyage under a particular master, without any clause providing for a change of master, are not discharged from the articles by the dismissal of the master by reason of sickness, or any other reasonable cause, and the appointment of a new master; but they are bound to obey the new master.

If in such case they combine togeth-

er to refuse all duty on board, and to refuse obedience to the new master, that is an endeavour to make a revolt within the meaning of the crimes act of 1790, ch. 9 [36], § 12. *United States vs. Haines*. 272

4. If the crew combine together to refuse to do duty, and actually refuse until the master complies with some improper request on their part, it is an endeavour to make a revolt within the Crimes Act of 1790, ch. 9, [36,] § 12. *United States vs. Gardner*. 402

5. If the crew combine together not to do duty, it is an endeavour to make a revolt within the Crimes Act of 1790, ch. 9, [36,] § 12, although no orders are actually given afterwards. *United States vs. Barker*. 404

6. If the shipping articles are to the final port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port until the whole is discharged. *United States vs. Barker*. 404

7. Port of destination and port of discharge are not equivalent words. Some cargo must be unladen to make the port of destination the port of discharge, or an actual termination of the voyage there. *United States vs. Barker*. 404

8. To affect the master of a vessel with the penalty provided for his non-delivery of a temporary register, granted under the 3d Section of the Coasting Act of 1793, ch. 52, there must not only be an arrival at the port, to which the vessel belongs, but it must be an arrival there, not by accident, or from necessity, but intentionally, as one of the termini of the voyage. *United States vs. Shackford*. 445

9. To constitute an endeavour to commit a revolt within the crimes act of 1790, ch. 36, it is necessary that there should be some effort or act to stir up others of the crew to disobedience of the master.

To constitute a confinement of the master within the purview of the same act, it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement upon the master. *United States vs. Savage*. 460

10. The master has authority to displace the mate, and all other subordinate officers, during the voyage. If he abuses his authority, he is responsible for the wrong.

Seemle, that the *mate* is a *seaman*, within the crimes act of 1790, ch. 36, § 12. *United States vs. Savage*. 460

11. The master of a ship has not, in virtue of his office, any authority to sell a ship, except in cases of extreme necessity, where the vessel is wrecked, or unnavigable, &c.

If he sells without such necessity, the sale is invalid, notwithstanding he has acted with good faith, at least, where the contest is between the owner and the purchaser.

Quary, how it would be between the underwriter on a policy, and the owner. *Schooner Tilton*. 465

12. A wreck sale, made by authority of the statute laws of a State, is valid to pass the title to the property, where there is no owner or agent present to protect or claim the property.

Construction of the laws of *North Carolina*, on this subject. A sale at the solicitation or order of the master, is not a statute sale under those laws, binding the owner. *Schooner Tilton*. 465

13. A statute sale, if fraudulent, will not bind the owner, unless in favour of a *bond fide* purchaser, for a valuable consideration, without notice, actual or constructive, of the fraud.

What is such notice? *Schooner Tilton*. 465

14. A special contract between ship-owners and a shipper of goods, to receive half profits in lieu of *freight* on the shipment for a foreign voyage, is not a case of merchants' accounts, within the exception of the statute of limitations. *Spring vs. Gray*. 505

See ADMIRALTY.

SHIP-MASTER.

See SHIPS and SHIPPING.

STATUTES COMMENTED ON.

UNITED STATES.

1789. ch. 20.	Judiciary act. Duties.	35
1790. 9. sec. 12.	Revolt.	402, 404
" 36.	{ Ship Mentor	460
" sec. 12.	{ Revolt	
" 36. sec. 16	mate.	
" 9.	Personal Goods.	537
" 9.	Larceny.	356
1793. ch. 52.	Register.	445
1799. 128. sec. 65	Priority of Uni-	572
"	ted States.	
"	Duties.	380
"	65 Priority of Uni-	289
"	ted States.	
1817. 97.	Navy Bonds.	82

1820. 122.	{ Commercial In-	120
1823. 150.		
1824. 136.	Tariff act. Duties.	80
" 140.	see 6. Spanish Treaty.	62
1825. 67.	Ship Master.	192
" 276.	see 22. High Seas.	290
"	see 3. Larceny.	356

MASSACHUSETTS.

1794. ch. 65.	Trustee Process.	289
1797. 50.	Process.	35
1823. 242.	Attachment.	407

RHODE ISLAND.

1768.	Intestate Estates.	221
1798.	see 7. Conveyance.	67, 115
1822.	Intestate Estates.	221

SURETY.

1. A surety on a custom-house bond, who has paid it, has the same priority, as the *United States*, against the estate of his principal in the hands of his assignee.

If such surety become insolvent, and the same person is assignee of both estates, the funds of the principal to the extent of the debt due such surety, as a priority creditor is by operation of law deemed assets of the surety; and if the latter is also indebted to the *United States* for other debts, the *United States* may, by a bill in equity against the assignee, ensure its priority out of such fund or assets. *United States vs. Hunter*. 62

2. The act of 1817, ch. 197, respecting the bonds of persons in the navy, having required, that every person then in service &c. shall, instead of the bond required by a former act, enter into a new bond with sureties conditional for the faithful performance of his duties &c., the sureties on the old bond are discharged from all responsibility for monies received by any person &c., after he has given the new bond, the latter being, by the act, a substitute for the former. *United States vs. Wardwell*. 82

3. If an administrator be at the same time guardian of the legatees or distributees, and receive foreign assets as abovesaid, and do not inventory or account for them, or procure any settlement of them in the Probate Court, and a distribution of them according to law, he will be deemed to receive them as administrator, and not to retain them as guardian. Some act or admission showing a retainer as guardian, as an

accounting in the probate office as guardian for the same, is necessary to exonerate him from liability as administrator.

The sureties of an administrator are liable in the same manner as their principal for assets so received, until some act or admission establishing a retainer as guardian. *A fortiori* the rule is so, where the administrator has never admitted the receipt of such assets as guardian or administrator; but fraudulently concealed the fact from all the parties in interest. *Pratt vs. Northam.* 95

TAXES.

See TRESPASS, 1.

TENANT IN COMMON.

A tenant in common can recover no more than his own moiety or portion of the estate, where he has not disseized his co-tenants. *Stevens vs. Ruggles.* 221

TRESPASS.

Trespass lies against a collector of taxes, for imprisoning a party who is taxed as an inhabitant of a town, if he is not an inhabitant; for the assessors have no right to tax a person not an inhabitant; and if they do, it is an excess of jurisdiction. *Thurston vs. Martin.* 497

TRUSTEE.

Interest will not be allowed against a Trustee holding a fund, when he had made no interest, if there be no laches or neglect, or use of the money on his part. *Cassels vs. Vernon.* 332

TRUSTEE PROCESS.

1. Where goods on consignment at *Boston* were, on the failure of the owners, assigned for the benefit of creditors, and before notice to the consignees of the assignment could be reasonably given, another creditor of the debtor's attached them by a trustee process in *Boston*, the debtor and the creditors

being citizens of the state of *Pennsylvania*; it was held, that the assignment, if *bond fide*, was a sufficient title to pass the goods to the assignees, and to overreach the trustee process. *Bhollen vs. Cleveland.* 174

2. Under the trustee process of *Massachusetts* by statute of 1794, ch. 65, if the trustee swears he has no goods, effects or credits of the debtor in his hands, he is entitled to be discharged, unless, from other parts of his disclosure, that averment is overthrown. *United States vs. Langton.* 289

3. The trustee process lies against assignees in favour of the *United States*, where a debtor makes an assignment of his property in trust to pay custom-house bonds, or other debts due to the *United States*, to attach the funds to the amount of such trust, in the hands of the assignees, notwithstanding at law, the assignment passed the property clothed with the trust, to the assignees. *United States vs. Langton.* 289

WASTE.

It is not waste in a tenant for life to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, for such repairs, provided this be proved to be the most economical mode of making the repairs. *Loomis vs. Wilbur.* 13

WAY.

If a right of way be limited to particular purposes, and there yet be a covenant, that the same way shall be kept open and free of incumbrances, the grantor has no right to put a fence on the same, or in any other manner to obstruct the same way. *Brownell vs. Dyer.* 227

WRIT OF ENTRY.

A writ of entry, to foreclose a mortgage, may be well maintained against a tenant in possession, who is only lessee at will to the mortgagor. *Fales vs. Gibbs.* 462

ERRATA.

Add on page 94, and second line of the opinion in the case of the *United States vs. Wardwell*, the following sentence, omitted by mistake in printing.

"In truth the same point was substantially decided by the Supreme Court in the case of the *United States vs. Kirkpatrick* [9 *Wheaton R.* 720] and further discussion of it would seem to be unnecessary."

On page 444, line 30, for "*in this respect*," read "*in some respects*."

On page 452, line 28, after "*former*," insert "*order*."

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